No. 6467

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE J. K. MULLEN INVESTMENT COMPANY, a Corporation, *Appellee.*

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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In the District Court of the United States, for the District of Idaho, Eastern Division

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The J. K. Mullen Investment Company, a Corporation, *Plaintiff*, vs. The United States of America, *Defendant*.	No. 743 Portions of Petition Filed July 24, 1930

* * * * * *

5.

That heretofore and under date of May 2nd, 1916, the said City of American Falls (then Village of American Falls), a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 70, which was an ordinance of intention to create and establish Local Improvement District No. 9 of said Village of American Falls, for the construction of cement sidewalks and cross walks upon certain portions of the village streets; that thereafter and in regular course, and under date of June 7th, 1916, said Village enacted its Ordinance No. 76, which was an ordinance creating and establishing a Local Improvement District, to be called Local Improvement District No. 9 of said Village, which ordinance described the property to be included in the district and provided for the construction of certain cement sidewalks and cross walks within said

district; that the latter ordinance further provided that the full cost and expense of constructing said sidewalks and improvements should be taxed and assessed upon the property within the district in proportion to the benefit derived from the improvement, and that such assessments should become a lien upon the land and take precedence of all other liens; that in accordance with the terms of such ordinance, the assessments were duly levied upon the lands within said district, and under date of September 6th, 1916, said village duly enacted its ordinance No. 81, which was an ordinance approving and confirming the proceedings had and taken in creating and establishing said Local Improvement District, and in making the assessments for the construction of the improvements, and approving and confirming the assessment roll prepared by the village engineer and the committee on streets, and the assessments levied by virtue thereof, and said ordinance further provided for the payment of such assessments in ten equal installments, deferred payment bearing interest at the rate of 7 per cent per annum; that thereafter and under date of December 14th, 1916, the said City of American Falls (then Village of American Falls), duly and regularly enacted its Ordinance No. 85, which ordinance authorized and provided for the issuance, execution, sale and delivery of Special Assessment Improvement Bonds in the aggregate principal sum of $25,500.00, to provide

for the construction of cement sidewalks and cross walks in and for said Local Improvement District No. 9; that said ordinance prescribed the form and date of the bonds, and the time of the payment thereof, and provided for the levying and collection of special assessments to pay the same in accordance with their tenor.

* * * * * *

9.

That on or about the 1st day of January, 1927, the defendant, under Acts of Congress of the United States, and acting by and through its duly authorized agents of the Department of the Interior of the United States and the United States Reclamation Service, but without any proceedings in eminent domain and without making any compensation whatever to this plaintiff, took absolute, permanent and exclusive possession, title and control of all the hereinafter described portions of the real property within said Local Improvement District No. 9, for a public use and purpose, to-wit, for a reclamation reservoir, which reservoir is commonly known as the American Falls Reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said improvement district and inundated and permanently flooded the land embraced within said improvement district, and thereby deprived the plaintiff of its said property and totally destroyed plaintiff's said property, and

thereby completely and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and bonds aforesaid against the hereinafter described lots within said district, and the improvement thereon; the lots within said Local Improvement District No. 9, so inundated and possessed by the defendant, being particularly described as follows, to-wit:

Lots 1, 2, 3, 4, 5, 6, 7, 8 and 9, Block 3;

West 60 feet of Lots 1 and 2; East 65 feet of Lots 1 and 2; Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, Block 4;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, Block 5;

Lots 1, 2, 3, 4, 5, 6, 7, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, Block 6;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, Block 7;

West 33 feet of Lots 1, 2 and 3; East 92 feet of Lots 1, 2 and 3; Lots 4, 5, 6, 7, 8 and 9, Block 8;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, Block 9;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, Block 10;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, Block 25;

Lots 1, 2, 3, 4, 5, 6, 7, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, Block 26;

East 192 feet of Lot 1; South 20 feet of Lot 1;

Lots 2, 3, 4, 5; North 72 feet of Lot 6; South 144 feet of Lots 6, 7, 8, 9, 10, 11; West Half of Lots 12 and 13, and East Half of Lots 12 and 13, Block 211;

Tax Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, Block 217;

Lots 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, Block 3;

All of said lots being within said Improvement District No. 9, and in the Original Townsite of American Falls.

* * * * * *

(Title of Court and Cause)

AMENDED PETITION

Filed Oct. 27, 1930

Comes now the plaintiff, The J. K. Mullen Investment Company, a corporation, and as and for its amended petition against said defendant, complains and alleges as follows, to-wit:

1.

That the plaintiff, The J. K. Mullen Investment Company, is a corporation organized and existing under and by virtue of the laws of the State of Colorado, with its principal place of business at Denver, Colorado, and is now, and since the date of its incorporation has been, a citizen and resident of the State of Colorado.

2.

That during all the times hereinafter mentioned, the defendant has been, and now is, The United States of America.

3.

That at all times hereinafter mentioned, the Village, now City, of American Falls, has been, and now is, a municipal corporation of Power County, State of Idaho, and as such City and such Village, has all the powers incident to, and vested in, a municipal corporation of the State of Idaho.

4.

That this action involves a claim against the Government of the United States, for an amount less than $10,000.00, upon an implied contract for compensation.

5.

That heretofore and under date of May 2nd, 1916, the said City of American Falls (then Village of American Falls), a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 70, which was an ordinance of intention to create and establish Local Improvement District No. 9 of said Village of American Falls, for the construction of cement sidewalks and cross walks upon certain portions of the village streets; that thereafter and in regular course, and under date of June 7th, 1916, said Village enacted its Ordinance No.

76, which was an ordinance creating and establishing a Local Improvement District, to be called Local Improvement District No. 9 of said Village, which ordinance described the property to be included in the district and provided for the construction of certain cement sidewalks and cross walks within said district; that the latter ordinance further provided that the full cost and expense of constructing said sidewalks and improvements should be taxed and assessed upon the property within the district in proportion to the benefit derived from the improvement, and that such assessments should become a lien upon the land and take precedence of all other liens; that in accordance with the terms of such ordinance, the assessments were duly levied upon the lands within said district, and notice of the filing of such assessment roll was thereupon duly published, and under date of September 6, 1916, said Village duly enacted its ordinance No. 81, which was an ordinance approving and confirming the proceedings had and taken in creating and establishing said Local Improvement District, and in making the assessments for the construction of the improvements, and approving and confirming the assessment roll prepared by the village engineer and the committee on streets, and the assessments levied by virtue thereof, and said ordinance further provided for the payment of such assessments in 10 equal installments, deferred payments bearing interest at the rate of

7 per cent per annum; that thereafter and under date of December 9th, 1916, the said City of American Falls (then Village of American Falls), duly and regularly enacted its Ordinance No. 85, which ordinance authorized and provided for the issuance, execution, sale and delivery of Special Assessment Improvement Bonds in the aggregate principal sum of $25,500.00, to provide for the construction of cement sidewalks and cross walks in and for said Local Improvement District No. 9; that said ordinance prescribed the form and date of the bonds, and the time of the payment thereof, and provided for the levying and collection of special assessments, then calculated sufficient to pay the same in accordance with their tenor, but that through mistake or inadvertence the levies and assessments so made and levied were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable, or at all.

6.

That in accordance with the authority in said Ordinance No. 85 contained, the said Village of American Falls issued, under date of September 1st, 1916, 51 certain Special Assessment Improvement Bonds for said district, numbered consecutively from 1 to 51, both inclusive, each of said bonds being in the principal amount of $500, and being payable on the 1st day of September, 1926, and bearing interest

at the rate of 7 per cent per annum; that said bonds were similar in form, except as to numbers; that bond No. 38 of said series was and is in the following words and figures, to-wit:

UNITED STATES OF AMERICA
STATE OF IDAHO
COUNTY OF POWER

No. 38 $500.00

VILLAGE OF AMERICAN FALLS
Special Assessment Improvement Bond
Local Improvement District No. 9

KNOW ALL MEN BY THESE PRESENTS, That the Village of American Falls, of Power County, Idaho, acknowledges itself to owe and for value received hereby promises to pay to the bearer hereof the principal sum of FIVE HUNDRED DOLLARS on the 1st day of September, A. D. 1926, together with interest on said sum from the date hereof until paid at the rate of seven (7) per centum per annum, payable semi-annually on the 1st days of March and September, respectively, in each year, as evidenced by and upon the presentation and surrender of the interest coupons hereto attached as they severally become due; and both the said interest on and principal of this bond are hereby made payable in lawful money of the United States of America at the National Bank of Commerce, in the City and State of New York, U. S. A., out of the local improvement fund heretofore created for the payment of the costs and expenses of the improvement in Local Improvement District No. 9,

Village of American Falls, and not otherwise.

This bond is issued by said village for the purpose of providing funds for the construction of cement sidewalks in said Local Improvement District No. 9, pursuant to, under, by virtue of and in all respects in full and strict compliance with the constitution and Section 2238 of the Revised Codes of the State of Idaho, as amended by Chapter 81 of the 1911 Session Laws, and Chapter 97, Idaho Session Laws of 1915, and all laws of said state supplementary thereto and amendatory thereof, and an ordinance of the said village passed and approved prior to the issuance of this bond.

And it is hereby certified, recited and warranted that said village is now and for some years past has been a village of said state, and a body politic and corporate, duly organized, existing and operating under and by virtue of the constitution and laws of the State of Idaho, and is now and always has been under the control of a duly organized board of trustees as the duly constituted corporate authority thereof; that all things, acts and conditions required by the constitution and laws of the State of Idaho and the ordinances of said village, to exist and to happen and be done and performed, precedent to and in the creation of the said Local Improvement District No. 9, and the construction of cement sidewalks therein and therefor, and the issuance of this bond in order to constitute the said bond the valid and binding obligation of said village, and payable as aforesaid, do exist

and have happened and been done and performed in regular and due form and time; that the total costs and expenses of said improvements have been duly levied and assessed as special assessments for sidewalks improvements upon all of the lands, lots and pieces and parcels of land in said Local Improvement District No. 9, separately and in addition to all other taxes, and said special assessments are a lien upon said lands, lots and pieces and parcels of land, and take precedence of all other liens; that due provision has been made for the collection of said special assessments, together with interest on unpaid installments at the rate of seven (7) per centum per annum, sufficient to pay the interest accruing hereon promptly when and as the same falls due, and also to discharge the principal hereof at maturity.

In conformity with subdivision 14, Chapter 97 of said Session Laws of 1915, it is hereby recited that 'The holder of any bond issued under the authority of this section, shall be no claim therefor against the city or village by which the same is issued, in any event, except from collection of the special assessment made for the improvement for which said bond was issued, but his remedy, in case of non-payment, shall be confined to the enforcement of such assessments. A copy of this subdivision shall be plainly written, printed or engraved upon the face of each bond so issued.'

This bond is redeemable at the option of said Village after July 1, 1924.

IN TESTIMONY WHEREOF, The Village of American Falls, Power County, Idaho, by its board of trustees, has caused this bond to be signed by the chairman of the board of trustees of said village, countersigned by the village treasurer and attested by the clerk of said village, and sealed with the corporate seal of said village; and each of the twenty interest coupons hereto attached to be signed by the engraved facsimile signatures of said chairman, treasurer and clerk, the 1st day of September, A. D. 1916.

H. C. WONES,
Chairman Board of Trustees.

Countersigned: J. T. DORAN,
(Seal) *Village Treasurer.*

Attest:
O. F. CROWLEY,
Village Clerk.

STATE OF IDAHO,)
COUNTY OF POWER,) ss.
VILLAGE OF AMERICAN FALLS)

I, O. F. CROWLEY, Village Clerk in and for the Village of American Falls, Power County, Idaho, hereby certify that I have recorded the within bond, the said record showing the number and amount of the said bond, and for and to whom the same was issued.

IN WITNESS WHEREOF, I have hereunto set my band and affixed the official seal of said village.

O. F. CROWLEY,
(Seal) *Village Clerk.*"

7.

That in regular course, before the maturity date of said bonds, one J. K. Mullen purchased and acquired certain of said bonds, to-wit, bonds numbers 38 to 51, both inclusive, paying therefor the full face value of said bonds, and that thereafter and in the regular course of business, and for value, said J. K. Mullen sold, transferred and set over to this plaintiff, The J. K. Mullen Investment Company, a corporation, the bonds aforesaid, and that this plaintiff is now the owner and holder of the same, and has not sold, or transferred or parted with title to said bonds, or either of them, and is now the lawful owner and holder of said fourteen bonds, and each of them; and that no part of said fourteen bonds, or either of them, has been paid, except the interest thereon to December 1st, 1926, and there is now due, owing and unpaid to this plaintiff on account thereof the sum of $7000.00, with interest thereon at the rate of seven per cent per annum from and after December 1st, 1926, and the whole thereof.

8.

That under the terms of said bonds, and under the applicable statutes of the State of Idaho, the only method of enforcing and collecting said bonds was by the levy and collection of special assessments upon the property within said Local Improvement District, which assessments had to be levied and collected in the same manner as provided by law for the

levy and collection of special assessments for such improvements where no bonds were issued, and the said bonds, and the obligation represented thereby, under express provisions of said statutes, became a lien upon the lands within said Local Improvement District, which liens have "precedence of all other liens"; that under the express provisions of the statutes authorizing the making of such assessments and issuance of the foregoing bonds, this plaintiff has no claim on account of said bonds against said Village-City of American Falls, except that said village was obligated to levy and collect the assessments; that the said Village-City of American Falls, from the issuance of said bonds until prevented from so doing by the acts of defendant, as hereinafter alleged, levied special assessments, in accordance with said statutory provisions for the payment of said bonds, and the interest thereon, against the property in said respective districts, which assessments were made and levied in the same manner as provided by law for the levy and collection of special assessments, under said statutory provisions.

9.

That on or about the 1st day of January, 1927, the defendant, under Acts of Congress of the United States, and acting by and through its duly authorized agents of the Department of the Interior of the United States and the United States Reclamation Service, but without any proceedings in eminent do-

main and without making any compensation whatever to this plaintiff, the defendant being well aware and advised that the bonds so held by this plaintiff, and the interest thereon, were outstanding, due and unpaid, and that the assessments levied against the property were insufficient to pay such outstanding bonds, so held by the plaintiff, took absolute, permanent and exclusive possession, title and control of all the hereinafter described portions of the real property within said Local Improvement District No. 9, for a public use and purpose, to-wit, for a reclamation reservoir, which reservoir is commonly known as the American Falls Reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said improvement district and inundated and permanently flooded the land embraced within said improvement district, and thereby deprived the plaintiff of its said property and totally destroyed plaintiff's said property, and thereby completely and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and bonds aforesaid against the hereinafter described lots within said district, and the improvements thereon; the lots within said Local Improvement District No. 9, so inundated and possessed by the defendant, being particularly described as follows, to-wit:

Lots 1, 2, 3, 4, 5, 6, 7, 8 and 9, Block 3;

West 60 feet of Lots 1 and 2; East 65 feet of Lots 1 and 2; Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,

13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, Block 4;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, Block 5;

Lots 1, 2, 3, 4, 5, 6, 7, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, Block 6;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, Block 7;

West 33 feet of Lots 1, 2 and 3; East 92 feet of Lots 1, 2 and 3; Lots 4, 5, 6, 7, 8 and 9, Block 8;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, Block 9;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, Block 10;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, Block 25;

Lots 1, 2, 3, 4, 5, 6, 7, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, Block 26;

East 192 feet of Lot 1; South 20 feet of Lot 1; Lots 2, 3, 4, 5; North 72 feet of Lot 6; South 144 feet of Lot 6, 7, 8, 9, 10, 11; West Half of Lots 12 and 13, and East Half of Lots 12 and 13, Block 211;

Tax Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, Block 217;

Lots 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, Block 3;

All of said lots being within said Improvement District No. 9, and in the Original Townsite of American Falls.

and that the property, so taken by the defendant as aforesaid, was at the time of such taking and destruction of a value greatly in excess of plaintiff's said claim.

10.

That the bonds so held and owned by the plaintiff as hereinbefore alleged were and are worth their respective face values, together with accrued and unpaid interest, and by and through the defendant's destruction of plaintiff's property as aforesaid, the defendant has become and is indebted to this plaintiff in the amount of the unpaid assessments outstanding and unpaid against the above described lots so inundated and possessed by the defendant; that the total of the unpaid assessments against the above described lots, so due and unpaid, is the sum of $1,514.23, which sum bears interest at the rate of seven per cent per annum from and after the 3rd day of July, 1928.

WHEREFORE, Plaintiff prays that it have and recover judgment against defendant for the sum of $1,514.23, together with interest thereon at the rate of seven per cent per annum from and after July 3rd, 1928, together with costs of suit and all proper relief.

W. G. BISSELL,
BRANCH BIRD,
Solicitors for Plaintiff.
Address: Gooding, Idaho.

(Duly verified)

(Title of Court and Cause)

DEMURRER TO AMENDED PETITION

Filed Oct. 31, 1930

Comes now the defendant and demurs to the amended petition of the plaintiff herein on the ground:

1. That said amended petition fails to state facts sufficient to constitute a cause of action.

2. That said amended petition shows upon its face that the action is for recovery of an amount of money claimed to be secured by a lien, and that the owner of the property affected by the said lien has never been obligated for the amount claimed by the plaintiff but that the property, only, is subject to payment of the said lien. That the purchaser of property subject to a lien, who has not assumed or agreed to pay the note or bond or other instrument secured by such lien, is not personally liable for the note or bond and may be sued only in a foreclosure action against the property.

3. That the jurisdiction of the court to entertain actions against the United States for the taking of property for public use is limited to cases where the officers of the United States who took the property used by, or for, the United States, acknowledge the plaintiff's ownership thereof at the time of such taking and did not take the same under claim of

ownership in the United States, but that the amended petition wholly fails to show any acknowledgment by the officers of the United States that the plaintiff herein had any title or interest in the lands and other property alleged to have been taken and inundated for reservoir purposes and, by necessary implication, shows that the same were taken under claim of ownership in the United States and that such taking, therefore, cannot give rise to an action against the United States.

4. That the jurisdiction of the court to entertain actions against the United States for damage resulting from the taking of property for public use is limited to cases where the damage was of a kind which was known, intended, expected and foreseen by the government officers at the time of the construction of the governments works, but the amended petition herein wholly fails to show that any damage to plaintiff was foreseen or intended by the government officers.

5. That the amended petition, and particularly that part of paragraph 7 reading

> "and that *thereafter* * * * said J. K. Mullen sold, transferred and set over to this plaintiff * * * the bonds aforesaid",

wholly fails to show that the plaintiff owned any bonds or other property of any kind or had any interest in or lien on any property of any kind whatsoever at the time (on or about January 1, 1927) when the

damage complained of is alleged to have occurred through the flooding of the reservoir lands, and that the law applicable to such cases vests the right to the claim for damages in the party who was the owner of the damaged property, or of some interest therein, at the time the alleged damage occurred. That a subsequent transfer of the damaged property does not carry with it any transfer of the claim for damages, the right to such damage claim remaining in the original owner, the presumption being that the purchaser of damaged property pays only the reduced or depreciated value thereof and suffers no loss, and that such rule is especially strong in cases against the United States because the federal statutes expressly prohibit the assignment or transfer of claims against the United States.

6. And the defendant further demurs to the amended petition of the plaintiff herein for the reason that said amended petition fails to state facts sufficient to constitute a cause of action in that the said amended petition is indefinite and uncertain and insufficient to state a cause of action in the following particulars:

A. That pursuant to Section 3097, Idaho Compiled Statutes, and decisions of the Idaho State Supreme Court construing the same, the lien of State and County taxes takes precedence over liens for special improvement district assessments but that the amended petition fails to allege that the defendant

acquired title to the lots, designated in said amended petition as being within Special Improvement District No. 9, in some manner other than by purchase at tax sale for delinquent State and County taxes.

B. That the amended petition fails to show whether the assessments referred to in paragraph 10 thereof and therein alleged to remain unpaid are original assessments or re-assessments, and when and how the alleged unpaid assessments were made.

C. That the amended petition is indefinite in that it fails to allege the time the plaintiff became the owner of the bonds upon which it bases its action.

D. That the amended petition fails to allege in what manner the United States, by its action in January, 1927, prevented the City of American Falls from levying assessments for the payment of the plaintiff's bounds, which matured on September 1, 1926.

E. That the amended petition fails to show the number, description, and ownership of those lots in said Improvement District No. 9 of American Falls not within the area of said district inundated by the American Falls reservoir.

F. That the amended petition fails to show whether or not said lots within said district, and outside the inundated area, have been sold to meet the assessment for payment of the plaintiff's bonds.

G. That the amended petition fails to allege that there are no other bonds of said district No. 9, in

the hands of others besides the plaintiff, which have not been paid.

H. That the amended petition fails to show the assessments levied against each of the lots numbered therein, the amounts paid thereon, if any, or whether or not any of said lots had the full assessment against the same paid in advance pursuant to Sections 4146 and 4148, Idaho Compiled Statutes.

I. That the amended petition fails to show the value of said lots numbered therein, or any of them. That the United States cannot under any condition be liable on account of any one or all of said lots for any amount in excess of the value thereof.

7. That there is a defect in parties plaintiff in that the plaintiff has not joined with it the owner or owners of those bonds in said district No. 9, not owned by the plaintiff.

8. That said amended petition is ambiguous, unintelligible and uncertain in that paragraph 7 of said amended petition alleges there is due to the plaintiff upon its bonds the sum of $7,000.00, with interest thereon at the rate of seven per cent per annum from and after December 1, 1926, while paragraph 10 of said amended petition alleges that there is due to the plaintiff on said bonds the sum of $1,514.23, with interest at seven per cent per annum from and after July 3, 1928.

9. That the amended petition shows upon its face that the alleged taking of property by the United

States in 1927 could not interfere with any timely, regular or lawful assessment made for the purpose of paying bonds which matured in 1926 and that the assessments claimed to have been interfered with and not paid must refer to a re-assessment made or attempted after 1927 and after the maturity of the bonds, the payment of all original and regular assessments, and the transfer of title to the United States. That the amended petition is insufficient in that it fails to show the existence of any of the facts which are necessary under the state law to authorize such re-assessment and is insufficient in failing to show any lawful authority in the taxing officers of the city or county to create a tax lien on property previously acquired by the United States and on which all liens existing at and prior to the time of purchase have been paid.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Title of Court and Cause)

MOTION TO STRIKE AMENDED PETITION

Filed Oct. 31, 1930

The defendant moves the Court to strike portions of the amended petition of the plaintiff as follows:

From paragraph 10, in the 3rd line thereof, strike the words "together with accrued and unpaid interest";

From paragraph 10, strike the last two lines thereof; and

From the prayer of said petition, strike the words "together with interest thereon at the rate of seven per cent per annum from and after July 3rd, 1928";

for the reason that the above designated parts of said amended petition are irrelevant and improper and contrary to the statute applicable to this class of actions, and in conflict with Section 284 (Judicial Code, Section 177 amended), Title 28, Code of Laws of U. S. A.

And the defendant further moves the Court to strike from paragraph 9 of the amended petition herein the words "but that through mistake or inadvertence the levies and assessments so made and levied were not in fact sufficient to pay the principal and interest on the said bonds", on the ground that the same are irrelevant and immaterial and do not state a cause of action, or any part of a cause of action, in that the statute authorizing re-assessment provides (Sec. 4141, I. C. S.):

"Whenever for any cause, mistake or inadvertence the amount assessed *shall not be sufficient to pay the costs of the sewerage improvement made and enjoined on the property*", etc.,

and that under the statute the insufficiency of a levy or assessment "to pay the principal and interest on said bonds" is not a ground for re-assessment.

And the defendant further moves the court to strike plaintiff's amended petition from the files for violation of the rules of this court in the filing of said amended petition without permission of the court.

This motion is based upon the said amended petition and upon the provisions of Section 284 (Section 177, Judicial Code as amended), Title 28 of the Code of Laws of the U. S. A., and Section 283 (Section 176, Judicial Code), Title 28 of the Code of Laws of the U. S. A., and Section 4141, I. C. S.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Title of Court and Cause)

MOTION TO REQUIRE PLAINTIFF TO MAKE AMENDED PETITION MORE DEFINITE AND CERTAIN

Filed Oct. 31, 1930

The defendant above named moves the court to require the plaintiff to make its amended petition

more definite and certain in the following particulars, to-wit:

1. That the plaintiff be required to allege in paragraph 9 of said amended petition the manner in which the United States acquired title to the lots mentioned in said amended petition and whether or not the same, or any of them, were acquired through tax sale for the payment of delinquent state and county taxes.

2. That the plaintiff be required to allege in paragraph 7 of its amended petition when the bonds described therein were acquired by the plaintiff.

3. That the plaintiff be required to allege the ownership of the remaining bonds of said district No. 9, mentioned in paragraph 9 of its amended petition, or if plaintiff is the owner of all outstanding and unpaid bonds of said district.

4. That the plaintiff be required to allege the number, description and ownership of those lots of said Improvement District No. 9 not described by paragraph 9 of said amended petition, and whether or not the lien of plaintiff's bonds upon said remaining lots has been foreclosed.

5. That the plaintiff be required to show the assessments levied against the said lots as in paragraph 8 of said amended petition alleged, when said assessments were levied, the number and amounts of such assessments paid, and the number and description of those lots, if any, upon which assess-

ments have been paid in advance as provided for in Sections 4146 and 4148, Idaho Compiled Statutes.

6. That as the plaintiff by paragraph 5 of its amended petition alleges that by Ordinance No. 81 of the City-Village of American Falls there was confirmed all proceedings relative to the levy of assessments upon the lands of the district, including the preparation of the assessment roll and the assessments levied by virtue thereof for the payment thereof in ten equal installments, so that all levies against the lots of said district were necessarily made and presumably collected prior to the maturity of said bonds on September 1, 1926, and by paragraphs 8 and 9 of its amended petition alleges the action of the defendant preventing the City-Village of American Falls from levying special assessments against said lots, which acts are alleged to take place in January, 1927, and by paragraph 10 of said amended petition the plaintiff alleges certain unpaid assessments outstanding and unpaid upon the lots described in paragraph 9 of said amended petition are in the sum of $1,514.23, it is moved that the plaintiff be required to allege in its amended petition whether the assessments outstanding and unpaid, as alleged in paragraph 10, were those assessments levied in 1916, as alleged in paragraph 5, under Ordinance No. 81, or, if said unpaid assessments were levied by said city subsequent to the levy made in 1916, that the date of said levy be alleged and the

ordinance of said city under which such re-assessments were made be supplied.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Title of Court and Cause)

ORDER

Filed Apr. 4, 1931

The demurrer to, and motion to strike, the second amended petition, and motion for a more definite statement, of the defendant, having been submitted, and after consideration of the same,

IT IS ORDERED, That said demurrer and motions be and the same are hereby overruled.

Dated: Boise, Idaho, April 4th, 1931.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

ANSWER TO AMENDED PETITION

Filed May 6, 1931

Comes now the defendant, United States of America, and as its answer to plaintiff's amended petition herein alleges as follows:

1. Defendant denies each and every allegation set out in plaintiff's amended petition herein, except the allegations expressly admitted by this answer.

2. Defendant admits the allegations of paragraphs 1, 2, and 3 of plaintiff's amended petition herein.

3. Replying to paragraph 4 of plaintiff's amended petition herein, the defendant admits that this action involves a claim against the government of the United States for an amount less than $10,000.00, but denies that the same is upon an implied contract for compensation, and alleges the facts to be that there has never been any contract, express or implied, of any kind or sort whatsoever, between the United States and the plaintiff herein.

4. Defendant has no knowledge, information or belief sufficient to enable it to answer the allegations set out in paragraphs 5, 6, and 7 of plaintiff's amended petition herein and therefore denies each and every allegation contained in said paragraphs 5, 6, and 7.

5. Replying to paragraph 8 of the plaintiff's amended petition herein, the defendant denies that under the applicable statute of the State of Idaho, the only method of enforcing and collecting the said bonds was by the levy and collection of special assessments upon the property within said improvement district, and alleges the facts to be that under the terms of the said bonds, and under the applicable statutes of the State of Idaho, the special assessments

for the payment of the cost of the said work and for the payment of the said bonds had already been levied, assessed and apportioned to the various lots, parcels and tracts of land in said improvement district prior to the time that the said bonds were issued and sold, and that the said bonds show upon their face that said opportionment and assessment of the costs of said improvement had already been made at the time the bonds were issued, and that in the event of failure to pay such assessment, the statutes give a remedy by foreclosure of the assessments so referred to. Defendant denies that assessments have to be levied and collected in the same manner as provided by law for the levy and collection of special assessments for such improvements where no bonds were issued. Defendant denies that the said bonds or the obligation represented thereby, under express provisions of said statutes or otherwise, became a lien upon the lands within said sewerage and improvement district, but alleges the facts to be that the assessments so levied and apportioned against the various tracts of land in said district are declared to be a lien but that the bonds themselves are not a lien, and defendant alleges that the costs of the said improvement work were duly assessed and apportioned to the various lots and tracts of land in the said special improvement district and were made payable in ten annual installments, as provided for in Chapter 80 of the Session Laws of Idaho of 1911,

and that under the provisions of subsection 11 of Section 2353 of the Political Codes of Idaho as amended by said Chapter 80 of the Session Laws of 1911, and particularly as set out on page 263, it is provided that

> The owner of any lot or parcel of land charged with any such assessment may redeem the same from all liability for said assessments at any time after said 30 days by paying all the installments of said assessment remaining unpaid and charged against such property at the time of such payment, with interest thereon at the rate of not to exceed eight per cent per annum from the date of issuance to the time of maturity of the last installment;

and defendant alleges that each and every one of the lots and parcels of land included in the said improvement district and within the said American Falls reservoir site was redeemed from the said assessment, so made and levied against the said lands for the payment of the cost of said improvement, by the United States and its predecessors in interest in the ownership of the said property, and that the said assessment and apportionment of costs has been fully paid, but that a portion of the money so paid in to be applied in the retirement of the said bonds and the interest thereon was, after the payment thereof, lost through failure of banks in which said funds were deposited without adequate security or diverted and lost in other ways more fully set out in the defend-

ant's second defense herein. Defendant further denies that the said Village-City of American Falls was obligated to levy and collect any assessments other than those which were levied and collected as aforesaid, and denies that the said Village-City of American Falls was prevented from levying assessments by any act of the defendant.

6. Replying to paragraph 9 of the plaintiff's amended petition, defendant denies that on or about the 1st day of January, 1927, the United States, acting by and through its authorized agents of the Department of the Interior, or at any time or in any manner except the time and in the manner alleged in defendant's second defense herein, took absolute, permanent and exclusive possession of all of the real property within said special improvement district without any proceeding in eminent domain; but alleges that prior to taking possession of said property and using the same for reservoir purposes, the United States acquired title thereto by purchase from the lawful owners of record of said property, and by proceedings in eminent domain, and in connection with said purchases and said proceedings in eminet domain paid or required to be paid all mortgages and liens appearing of record against the said premises, including all the said assessments so apportioned and levied against the said premises for the payment of the cost of the improvement in said special improvement district, and caused each and every

tract of land in said district to be redeemed from said assessments and said liens in the manner provided in the said statute, but that after a portion of said funds so paid by the United States and its predecessors in the ownership of the said lands had been lost through the said bank failures and through the neglect, negligence and misconduct of the city and its officers in depositing said funds in unsafe banks without adequate security and the use of a large part of the funds collected by the city in payment of excess interest incurred on said bonds through the delay and neglect of the city and its officers in failing to apply promptly and properly the funds collected from the lot owners to the retirement of the bonds and the action of the city and its officers in allowing such funds for long periods of time either to remain on deposit in local banks or to be used for other purposes while the bonds continued to draw interest which would have been avoided had said collections been promptly and properly applied to the retirement of the bonds, and after the United States had purchased and paid for the said property and had redeemed or caused the same to be redeemed from the liens of said assessments, the city council of the said Village-City of American Falls attempted to impose upon the United States an obligation to make up the losses resulting from the said carelessness, neglect and misconduct of the officers of the said municipality and other public officers of the

city and county handling the said funds as tax collections, and for such purpose attempted to make a re-assessment upon the lands and property then owned by the United States and acquired in the manner aforesaid, which void re-assessment so attempted by the said city council was the only assessment against the said premises which has not been fully paid; and defendant denies that the defendant ever deprived the plaintiff of its property or destroyed or damaged any property of the plaintiff in any manner whatsoever; and defendant alleges that, to the contrary, the actions of the United States as aforesaid were beneficial to the holders of the bonds of the said municipality and of the said special improvement district in that prior to the time that the United States began the negotiations for and the purchase of the said property, many lot owners in said improvement district had failed and neglected to pay their taxes and assessments and some of said lot owners had abandoned their said lots to tax sale and that by the said action of the United States, as aforesaid, in paying or requiring payment of all said assessments and tax liens on said premises, the amounts which were paid in on said assessments, and which became available for the payment of the bonds and the interest thereon, were larger than would have been collected if the United States had not purchased and taken over said property; that only a portion of the said townsite of American Falls was

so purchased, taken over, and used for reservoir purposes and that in the said portions of said townsite of American Falls which were not so purchased or condemned by the United States for reservoir purposes, many defaults occurred in the payment of taxes and a larger percentage of deficiency in the payment of bonds than in the section purchased by the United States for reservoir purposes as aforesaid.

7. Replying to paragraph 10 of the plaintiff's amended petition herein, defendant has no knowledge as to whether the bonds, if any, held or owned by the plaintiff were and are worth their respective face value with accrued and unpaid interest, and therefore denies the same; and defendant denies that there was any destruction of plaintiff's property by and through the defendant, and denies that the defendant has become or is indebted to the plaintiff in the amount set out in said paragraph 10 of the amended petition, or in any amount or amounts, or at all.

DEFENDANT'S SECOND DEFENSE

As defendant's second and further defense to plaintiff's alleged cause of action herein, defendant alleges:

8. That prior to the taking of any property for use in connection with the said American Falls reservoir, and prior to the flooding and use thereof, the United States acquired title to the same, free

from liens and encumbrances, in part by condemnation but mainly by purchase of said property from the record owners thereof, and paid or caused to be paid all liens of record against the said premises, including the liens for the cost of said improvements in said improvement district so assessed and apportioned against said premises as aforesaid, and caused each and every of the said lots to be redeemed from the said assessment and from the lien thereof and from each and every of the installments in which said assessment was provided to be paid, by payment in full of the said assessments and all installments thereof in the manner authorized and provided under Chapter 80 of the Session Laws of Idaho of 1911, page 263.

9. That a part of the funds so paid and intended for payment of special improvement district bonds, referred to in the petition herein, were lost in the following manner:

(a) That a part of the said money so collected was deposited by the municipal officers having charge thereof, without adequate security, in a local bank and was lost through the failure of said bank.

(b) That several thousand dollars of the funds which should have been applied to the payment of the principal of the said bonds was consumed in the payment of excess interest over and above the amount that should have been required for interest payment, which excess interest was allowed to accumulate on

the outstanding bonds while, through the delay and neglect of the city officers to apply promptly the moneys so collected from the lot owners to the retirement of the special improvement district bonds and the practice of allowing such funds either to remain idle on deposit in local banks or to be used for other purposes or both, the bonds remained outstanding and continued to draw interest.

(c) That by reason of such failure to apply promptly collections to retirement of bonds, the amount of money caught in the bank failure above referred to was largely in excess of the amount that would have been on deposit therein had such collections been promptly applied to retirement of the bonds, and that by reason of such bank failure, the part of the said deposit therein which was finally collected was tied up for a number of years and was unavailable for payment of bonds, so that the bonds which should have been paid remained outstanding and continued to draw interest, while said funds were tied up in the said closed bank, and funds thereafter collected by the city for the payment of said improvement bonds were largely consumed in the payment of excess interest, the interest charges being paid first, and as a result certain bonds having the largest serial numbers remained unpaid.

(d) That in various and sundry other ways, not fully known to the defendant, funds which should have been used on said special improvements or in

the payment of the bonds therefor were lost, dissipated or misapplied.

10. That after the United States had acquired title to the said property in the said reservoir site and had paid for the same, and paid or caused to be paid all liens of record, and had caused said property to be redeemed from the said local improvement district assessments as aforesaid, the city council of the City of American Falls attempted to make up the losses above enumerated by making a re-assessment and attempting to impose upon the United States an additional lien or burden by means of such re-assessment levied and attempted by the said city council after title to the said premises free from liens and encumbrances had vested in the United States, which re-assessment the defandant alleges was void; and that such void assessment, so attempted by the city council after title had passed to the United States, was the only assessment on the said property which has not been paid.

DEFENDANT'S THIRD DEFENSE

As a third separate and additional defense to plaintiff's amended petition herein, defendant repeats and reiterates each and every allegation set out in defendant's second defense herein and makes the same a part of defendant's third defense herein, and alleges:

11. That at the time the United States took pos-

session of the said property in the said American Falls reservoir site and applied the same to public use by the inundation of the same by the waters of the American Falls reservoir, the United States and the officers of the United States in charge of the said project claimed title to all of said property as the property of the United States and took the same under claim of title in the United States and never recognized the plaintiff herein as the owner of the said property or any part or interest therein.

DEFENDANT'S FOURTH DEFENSE

As a fourth separate and additional defense to plaintiff's amended petition herein, defendant reiterates and repeats each and every allegation set out in defendant's second defense herein and makes each and every of said allegations a part of defendant's fourth defense herein, and further alleges:

12. That at the time the said property in the said American Falls reservoir site was taken by the officers of the United States and applied to the said public use in connection with the said American Falls reservoir, it was not foreseen nor intended that the said action of the United States in purchasing, condemning and using said property for said public purpose would or could damage the plaintiff herein, or any of the bondholders of the said improvement district; but, to the contrary, it was expected that the said action of the United States in purchasing

said premises and causing the assessment of liens to be paid in full and the said property to be redeemed therefrom would be beneficial to the holders of the said bonds of said special improvement district, in providing a larger fund for the payment thereof than would otherwise have been available and in avoiding the losses which otherwise might have resulted from the failure of certain lot owners to pay taxes and the abandonment of certain lots to tax sale; and that the said officers of the United States, and all of the officers of the United States in charge of the said project, believed at the time of the purchase and taking of the said property by the United States, and still believe, that the said action of the United States and the said action of the said officers in so taking and using said property would and did prove beneficial to the bondholders.

DEFENDANT'S FIFTH DEFENSE

As a fifth separate and additional defense to plaintiff's amended petition herein, the defendant reiterates and repeats each and every allegation set out in defendant's second defense herein, and further alleges:

13. That defendant is informed and believes, and therefore and on that ground alleges the fact to be that the plaintiff acquired whatever interest, if any, the plaintiff may have in the said bonds claimed by plaintiff after the lands in the said reservoir site had

been acquired by the United States through purchase and condemnation aforesaid and after the same had been applied to the said reservoir purposes.

DEFENDANT'S SIXTH DEFENSE

As a sixth and further defense to plaintiff's amended petition herein, the defendant reiterates and repeats each and every allegation set out in defendant's second defense herein and further alleges:

14. That the United States acquired in the manner aforesaid most of the lands in said special improvement district and most of the lands in the said reservoir site more than five years prior to the date that this action was filed and that for more than five years prior to the date that this action was filed, the United States has held possession of the said lands openly, notoriously and adversely to the plaintiff and to all the world, and that this action is barred by Sections 6596, 6609, 6597, 6617, and 6611 of the Idaho Compiled Statutes and that part of said lands were so acquired by the United States more than six years prior to the filing of this action and that this action is barred under Title 28, Section 41, subsection 20 of the Code of Laws of the United States (Section 24 of the Judicial Code as amended).

DEFENDANT'S SEVENTH DEFENSE

As a seventh and further defense to plaintiff's amended petition herein, the defendant reiterates

and repeats each and every allegation set out in defendant's second defense herein and further alleges:

15. That there is no contract of any kind, express or implied, between the plaintiff and the United States, that the transactions set out and described in said amended petition, and more fully described herein, do not give rise to any actual contract or any contract implied in fact, but that the alleged damage complained of is indirect and based on an alleged duty on the part of the United States to pay taxes or special assessments or re-assessments and that this action is not within the jurisdiction of the court.

WHEREFORE, Defendant prays that the plaintiff take nothing by its complaint herein, and that the defendant have judgment against the plaintiff for its costs in this cause of action.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Duly verified)

(Title of Court and Cause)

FINDINGS OF FACT AND CONCLUSION OF LAW

Filed Jan. 23, 1932

Now on this 2nd day of November, 1931, the above matter came duly on for hearing, plaintiff being

present by W. G. Bissell and Branch Bird, its attorneys; defendant being present by H. E. Ray and B. E. Stoutemyer, its attorneys, whereupon plaintiff introduced its evidence and rested; defendant introduced its evidence and rested; plaintiff introduced its rebuttal evidence and rested, whereupon said cause was by the court taken under advisement, and the court being duly advised in the premises, does now make its findings of fact as follows:

FINDINGS OF FACT

1.

That at the time of, and for many years prior to, the filing of this suit, the J. K. Mullen Investment Company was and is a corporation of the State of Colorado with its principal place of business at Denver, Colorado, and was and is now a citizen and resident of the State of Colorado.

2.

That during all times the defendant is and has been the United States of America, and as such did and performed all of the acts hereinafter set out, acting by and through the agency of the United States Reclamation Service.

3.

That during all the times mentioned in the amended petition herein the Village (City) of American Falls was a municipal corporation of the State of Idaho.

4.

That this action involves a claim against the government of the United States for less than $10,000.00 upon an implied contract.

5.

That heretofore and under date of May 2nd, 1916, the said City of American Falls (then Village of American Falls), a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 70, which was an ordinance of intention to create and establish Local Improvement District No. 9 of said Village of American Falls, for the construction of cement sidewalks and cross walks upon certain portions of the village streets; that thereafter and in regular course, and on June 7th, 1916, said village enacted its Ordinance No. 76, which was an ordinance creating and establishing a local improvement district, to be called Local Improvement District No. 9 of said village, which ordinance described the property to be included in the district and provided for the construction of certain cement sidewalks and cross walks within said district; that the latter ordinance further provided that the full cost and expense of constructing said sidewalks and improvements should be taxed and assessed upon the property within the district in proportion to the benefit derived from the improvement, and that such assessments should become a lien upon the land and take precedence of all other liens; that in accordance

with the terms of such ordinance, the assessments were duly levied upon the lands within said district, and notice of the filing of such assessment roll was thereupon duly published, and on September 6th, 1916, said village duly enacted its Ordinance No. 81, which was an ordinance approving and confirming the proceedings had and taken in creating and establishing said local improvement district, and in making the assessments for the construction of the improvements, and approving and confirming the assessment roll prepared by the village engineer and the committee on streets, and the assessments levied by virtue thereof, and said ordinance further provided for the payment of such assessments in ten equal installments, deferred payments bearing interest at the rate of seven per cent per annum; that thereafter and on December 9th, 1916, the said City of American Falls (then Village of American Falls) duly and regularly enacted its Ordinance No. 85, which ordinance authorized and provided for the issuance, execution, sale and delivery of special assessment improvement bonds in the aggregate principal sum of $25,500.00, to provide for the construction of cement sidewalks and cross walks in and for said Local Improvement District No. 9; that said ordinance prescribed the form and date of the bonds, and the time of the payment thereof, and provided for the levying and collection of special assessments, then calculated sufficient to pay the same in accord-

ance with their tenor, but that through mistake or inadvertence the levies and assessments so made and levied were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable, or at all.

6.

That in accordance with the authority in said Ordinance No. 85 contained, the said Village of American Falls issued, on September 1st, 1916, 51 certain special assessment improvement bonds for said district, numbered consecutively from 1 to 51, both inclusive, each of said bonds being in the principal amount of $500, and being payable on the 1st day of September, 1926, and bearing interest at the rate of seven per cent per annum, payable semi-annually; that said bonds were similar in form except as to numbers, and that the form of said bond is set out in paragraph 6 of the petition herein.

7.

That upon the issuance of said bonds, and before maturity thereof, the said J. K. Mullen acquired all of said bonds, paying therefor the full face value thereof, and that afterwards the said J. K. Mullen transferred said bonds to the plaintiff, the J. K. Mullen Investment Company, a corporation, the plaintiff herein, and that said plaintiff is now the owner and holder of said bonds; that no part of said bonds, or either of them, has been paid for, except the

interest thereon until September 1, 1926, and there is now due, owing, and unpaid to the plaintiff on account thereof the sum of $7,000.00, with interest thereon at the rate of seven per cent per annum until the filing of this suit, to-wit, the 26th day of October, 1930.

8.

That all of said bonds are identical in form and substance, except in numbers, and the form of each of said bonds is set out in full in paragraph 6 of the complaint.

9.

That under the terms of said bonds, and under the applicable statutes of the State of Idaho, the only method of enforcing and collecting said bonds was by the levy and collection of special assessment upon the property within said local improvement district, which assessments had to be levied and collected in the same manner as provided by law for the levy and collection of special assessments for such improvements where no bonds were issued, and the said bonds, and the obligation represented thereby, under express provisions of said statutes, became a lien upon the lands within said local improvement district, which liens have "precedence of all other liens"; that under the express provisions of the statutes authorizing the making of such assessments and issuance of the foregoing bonds, this plaintiff has no

claim on account of said bonds against said Village (City) of American Falls, except that said village was obligated to levy and collect the assessments; that the said Village (City) of American Falls, from the issuance of said bonds until prevented from so doing by the acts of defendant, as hereinafter alleged, levied special assessments, in accordance with said statutory provisions for the payment of said bonds, and the interest thereon, against the property in said respective districts, which assessments were made and levied in the same manner as provided by law for the levy and collection of special assessments, under said statutory provisions.

10.

That on or about the 1st day of January, 1927, the defendant, under Acts of Congress of the United States, and acting by and through its duly authorized agents of the Department of the Interior of the United States and the United States Reclamation Service, but without any proceedings in eminent domain and without making any compensation whatever to this plaintiff, the defendant being well aware and advised that the bonds so held by this plaintiff, and the interest thereon, were outstanding, due, and unpaid, and that the assessments levied against the property were insufficient to pay such outstanding bonds, so held by the plaintiff, took absolute, permanent, and exclusive possession, title, and control of all the hereinafter described portions of the real

property within said Local Improvement District No. 9, for a public use and purpose, to-wit: for a reclamation reservoir, which reservoir is commonly known as the American Falls reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said improvement districts and inundated and permanently flooded the land embraced within said improvement district, and thereby deprived the plaintiff of its said property and totally destroyed plaintiff's said property, and thereby completely and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and bonds aforesaid against the hereinafter described lots within said districts, and the improvements thereon; the lots within said Local Improvement District No. 9, so inundated and possessed by the defendant, being particularly described as follows, to-wit:

Lots 1, 2, 3, 4, 5, 6, 7, 8, and 9, Block 3;

West 60 feet of Lots 1 and 2; East 65 feet of Lots 1 and 2; Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28, Block 4;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, Block 5;

Lots 1, 2, 3, 4, 5, 6, 7, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, Block 6;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, Block 7;

West 33 feet of Lots 1, 2, and 3; East 92 feet

of Lots 1, 2, and 3; Lots 4, 5, 6, 7, 8, and 9, Block 8;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, Block 9;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, Block 10;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, Block 25;

Lots 1, 2, 3, 4, 5, 6, 7, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28, Block 26;

East 192 feet of Lot 1; South 20 feet of Lot 1; Lots 2, 3, 4, 5; North 72 feet of Lot 6; South 144 feet of Lots 6, 7, 8, 9, 10, 11; West Half of Lots 12 and 13, and East Half of Lots 12 and 13, Block 211;

Tax Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, Block 217;

Lots 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, Block 3;

All of said lots being within said Improvement District No. 9, and in the Original Townsite of American Falls.

and that the property, so taken by the defendant as aforesaid, was at the time of such taking and destruction of a value greatly in excess of plaintiff's said claim.

11.

That at the time the defendant acquired the title to the various lots, tracts, and parcels of land within said improvement districts, the defendant was aware

that the assessments originally made against the property were insufficient to pay the bonds aforesaid, and the interest thereon in accordance with their terms, tenor, and effect, and for the purpose of protecting the United States against any claim of this plaintiff, withheld a portion of the purchase price agreed upon between the defendant and the respective sellers, which sum so withheld by said defendant for the purpose of protecting the United States against the claim of the plaintiff was approximately $14,000.00, which said sum included moneys withheld for the purpose of paying the amount due on the bonds of districts 1, 2, and 8 of American Falls.

12.

That on the date of the filing of this suit, to-wit, October 26, 1930, there was due and unpaid on account of the bonds of said district No. 9 the sum of $7,267.44; that prior thereto the City of American Falls had received payments made on account of said bonds from the various owners of the tracts, lots, and parcels of land situated within said district, certain sums of money which it had on deposit in the First National Bank of American Falls at the time of its failure, as part of which said sum has been collected from said insolvent bank, and that had said sums of money on deposit in said insolvent bank been applied to the payment of the bonds in district No. 9 in accordance with the terms of said bonds, that the

amount due on October 26, 1930, would have been the sum of $1,595.79 and that the defendant should be credited with such amount; and that after the allowance of such credit, the net amount due the plaintiff on account of said bonds on the 26th day of October, 1930, was and is the sum of $1,595.79.

13.

That the proportion of the area and value of district No. 9 taken by the United States Government for use as a reservoir site and for such purpose was 1514.23/5841.45 part of said district, and that the defendant became and is liable for 1514.23/5841.45 part of the amount due on account of said bonds.

14.

That on the 3rd day of January, 1917, the City of American Falls received a rebate from one Forter in the sum of $2,916.53, which said sum of money should have been applied to the payment of the bonds of said district, and that had said sums so collected by the city been applied to the payment of the bonds of district No. 9 at the time of its receipt, or as soon thereafter as the same could have been applied under the terms of the bonds that the district would have been entitled to credit in the sum of $5,671.65, and that the balance which under such circumstances would have been due on the date of the filing of this suit would have been the sum of $1,595.79, of which sum the proportionate share to be borne by the prop-

erty taken by the defendant, that is to say 1514.23/5841.45, or 25.92 per cent, is $388.48.

15.

That the loss occasioned by the deposit and loss of money in the failed First National Bank of American Falls was the sum of $1,496.86, for which said sum the district was given due credit in finding 12.

16.

That prior to the taking of the property and use as a part of the American Falls reservoir and prior to the flooding thereof, the defendant did not pay or cause to be paid all the liens against said improvement districts, but only paid the amount shown upon the original assessment, and at the time of the paying of the amount shown on the original assessment the defendant was aware that said original assessment through mistake and inadvertence was not sufficient to pay the bonds issued by said district No. 9 as the same became due and payable in accordance with their terms.

17.

That by the terms of the statute authorizing the same and by the terms of the bonds, all sums of money collected on account of said special assessments must be first used and applied to the payment of interest on said bonds; that no money collected for the payment of said bonds was lost through the delay and neglect of the city officials to apply

promptly the moneys collected from the lot owners for the retirement of the bonds, and that the moneys collected by the city, with the exception of the moneys lost by reason of the failure of the bank, were applied to the payment of the bonds in accordance with the statutes of the State of Idaho and the terms of the bonds; that at the time the United States took possession of the property in said American Falls reservoir site and applied the same to a public use, the United States and the officials of the United States in charge of the property took the same as the property of private individuals and at the time of the taking, recognized the rights of the plaintiff and withheld from the private individuals owning said property an amount of money sufficient to discharge the claim of the plaintiff.

18.

That at the time of the taking of said property by the defendant, it was known to the defendant and the officials of the Reclamation Service that the assessment levied in district No. 9 was insufficient to pay and discharge the amount due on the bonds aforesaid of district No. 9, and that the holders of said bonds would be deprived of the proportionate amount due thereon unless the same was paid by the defendant United States, and that at the time of the taking of the property in finding No. 10 set out, the defendant United States, acting by and through the Bureau of Reclamation, withheld from the record owners of

such property heretofore set out an amount sufficient to fully pay and discharge the claim of this plaintiff as against said property.

19.

That the defendant acquired all of the property above described in finding No. 10, within the limits of district No. 9, for reservoir purposes only, in some instances by condemnation proceedings, to which the plaintiff or its predecessor in interest was not made a party, but mainly by deeds from the record owners of such tracts at various and divers times between 1920 and January 1, 1927, and that the former record owners thereof retained the right of possession until January 1, 1927, and that the property was taken for a public purpose, that is to say, for reservoir purposes and flooded on or shortly after January 1, 1927.

And the court, after making the findings of fact, does here and now make its conclusions of law:

CONCLUSIONS OF LAW

1.

That the defendant by the taking and flooding of private property, to-wit: the lots, tracts, and parcels of land in finding No. 10 herein set out, the same being a part of district No. 9, for a public purpose, that is to say, for the construction of a storage reservoir, under authority of an Act, or Acts, of the Con-

gress of the United States, impliedly contracted to pay all damages suffered by any and all persons owning or having unpaid liens upon the real estate within said district up to an amount not exceeding the reasonable value of the property taken by it for, and applied to, a public use.

2.

That the plaintiff is entitled to and should recover 1514.23/5841.45, or 25.92 per cent, of the amount due upon and on account of said bonds, and interest, on the 26th day of October, 1930, after a credit of the amount collected by the city and lost in the failure of the First National Bank of American Falls and after the amount collected from Forter is deducted from said amount.

3.

That the statute of limitations began to run on the date of the flooding of the property, that is to say, on or about January 1, 1927, and that said statute is not available as a defense in this case.

4.

That the funds collected by the City of American Falls for the payment of the interest and principal of plaintiff's bonds were not negligently handled by the said city, and that there was no negligence on the part of the city, or its officials, which resulted in material loss to the rights of the defendant.

5.

That the plaintiff is entitled to judgment against the defendant in the sum of $388.48.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

JUDGMENT

Filed Jan. 28, 1932

This cause having come on for hearing in open court on November 2nd, 1931, the plaintiff being represented by W. G. Bissell and Branch Bird, its attorneys, and the defendant being represented by H. E. Ray and B. E. Stoutemyer, its attorneys; and evidence having been submitted, and briefs having been submitted, and the court having made and entered its findings of fact and conclusions of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the above named plaintiff have and recover judgment against the said defendant in the sum of $388.48, together with costs to be taxed herein at the sum of $19.50.

Dated at Boise, Idaho, this 28th day of January, 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

ORDER EXTENDING TIME FOR BILL OF EXCEPTIONS

Filed Jan. 14, 1932

Upon motion of the District Attorney and good cause appearing therefor,

IT IS ORDERED That the defendant United States of America be and is hereby given sixty days from date hereof in which to prepare and file a bill of exceptions in the above entitled cases consolidated for trial purposes.

Dated this 14th day of January, A. D. 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

ORDER EXTENDING TIME FOR BILL OF EXCEPTIONS

Filed March 3, 1932

Good cause appearing therefor,

IT IS ORDERED, That the above named defendant, United States of America, be and is hereby given thirty days' extension of time in addition to the extensions hereinbefore granted in these cases for the preparation, service and filing of its proposed bill of exceptions in said cases for appeal purposes.

Dated this 3rd day of March, A. D. 1932.

CHARLES C. CAVANAH,
District Judge.

BILL OF EXCEPTIONS

Filed May 13, 1932

BE IT REMEMBERED, That the above entitled causes having been placed regularly in the calendar of the above entitled court for consolidated trial at a stated term of the above entitled court, begun and holding in Pocatello, Idaho, at the October, 1931, term, to-wit, on the 3rd day of November, 1931, before the Hon. Charles C. Cavanah, District Judge, the issue joined in the above stated causes upon the second amended petition of the plaintiffs and the answer of the defendant thereto in case No. 731, and upon the amended petition of the plaintiffs and the answer of the defendant thereto in case No. 731, and upon the amended petition of the plaintiffs and answer of the defendant thereto in case No. 743, came on to be tried before the said Judge without the intervention of a jury, the action having been brought under the provision of the Act of Congress known as the "Tucker Act", the plaintiff being represented by W. G. Bissell, Esquire, its attorney, and the defendant by H. E. Ray, Esquire, United States Attorney for the District of Idaho, and B. E. Stoutemyer, Esquire, District Counsel of the U. S. Bureau of Reclamation; and upon the trial of those

issues the attorney for the plaintiff offered in evidence certain bonds marked for identification, plaintiff's Exhibits 1, 2, 3, and 4 (see appendix), and offered to prove the ownership thereof in the plaintiffs by calling as a witness Chester Green who, being duly sworn, objection was made to his or any testimony, upon ground as follows:

"MR. STOUTEMYER: Before we proceed with any evidence we wish to object to the introduction of any evidence in either of these cases at this time on the ground that it is apparent on the face of the complaint that neither of these cases are cases based upon contract, express or implied, between the United States and the plaintiff, and therefore are not cases within the jurisdiction of the court as defined by Act of Congress; and for the further reason that it is apparent from the face of the complaint that the allegations therein set out do not contain a cause of action.

THE COURT: I think I passed on that on demurrer. Objection overruled.

MR. RAY: May we have an understanding that all adverse rulings of either party is excepted to?

THE COURT: Yes."

Thereupon witness Green testified as follows:

"I am a district manager of the Inter-Ocean Elevators, which is owned and controlled by the Mullen interests, and I live in Salt Lake City, Utah. I remember the incident of the Village of

American Falls issuing certain improvement district bonds in 1915 and 1916, which bonds were purchased by Mr. J. K. Mullen at my suggestion.

"Q. Since the time of the purchase of those bonds have you been charged with the duty of looking after collecting the bonds?

A. Yes.

MR. STOUTEMYER: I object to this line of testimony and move that the previous answer be stricken upon the ground his information is based upon oral statements as to who purchased the bonds, and is incompetent. If those bonds were purchased the record will show who purchased them. It is not the best evidence.

THE COURT: Objection overruled."

I have been charged with the duty of looking after the collection of these bonds. I am acquainted with the J. K. and Catherine Mullen Benevolent Corporation which was organized in 1925.

"Q. At the time of his organization do you know what if any assets were transferred to the corporation by J. K. and Catherine Mullen?

MR. STOUTEMYER: I object to that as not the best evidence, and incompetent. The transfer was in writing, if there was one.

MR. BISSELL: These bonds were made payable to bearer.

MR. STOUTEMYER: I would like to ask a question in aid of the objection.

THE COURT: Yes.

MR. STOUTEMYER: Did you see any bonds

transferred to Mr. Mullen or to this corporation?

A. I did not see them transferred, no.

MR. STOUTEMYER: We renew our objection to the question as incompetent, and not the best evidence.

THE COURT: What position do you hold in the Oneida Elevator Company?

A. I am the district manager, at Salt Lake City, Utah, at this time.

THE COURT: It is doubtful if that is sufficient to show the transfer of the bonds, or that the bonds are an asset of the corporation."

The defendant thereupon had marked for identification four bonds of $1,000.00 each issued by District No. 1 and marked plaintiff's Exhibit 1; three bonds of $500.00 each and one of $150.00, issued by District No. 2, and marked plaintiff's Exhibit No. 2, and six bonds of $500.00 each, issued by District No. 8, and marked plaintiff's Exhibit No. 3.

Witness Green continued to testify:

I have seen the bonds (plaintiff's Exhibits Nos. 1, 2, and 3) before; they were delivered to me in person by Mr. J. K. Mullen, in Gooding, Idaho. I know who the president of the J. K. and Catherine S. Mullen Benevolent Corporation was; it was Mr. Wetbaugh.

"Q. At the time the assets were delivered to you, as whose property were they delivered?

MR. STOUTEMYER: That is objected to upon the ground no foundation has been laid; no way he could know except by hearsay.

THE COURT: Objection overruled.

MR. BISSELL: Answer the question.

A. What was the question?

(Question read.)

A. There was a memorial endowed, and to aid that Mr. Mullen contributed several million dollars for its assets.

MR. STOUTEMYER: I move that the answer be stricken as incompetent, and immaterial, and not the best evidence.

THE COURT: Motion denied.

Q. And were the bonds you hold in your hand, Exhibits 1 to 3, for the purpose of identification, delivered to you as the property of any corporation?

A. Yes, sir.

MR. STOUTEMYER: That is objected to, and I would like to ask a question in aid of objection.

THE COURT: Yes.

MR. STOUTEMYER: When you say when you were asked whether these were delivered as the property of any corporation, did you have any knowledge as to whose property they were other than what somebody stated to you?

A. The party that purchased the bonds delivered them to me.

MR. STOUTEMYER: Answer the question. Are you basing your answer on what someone else said to you?

A. What somebody said to me? Yes, sir.

MR. STOUTEMYER: That is hearsay and incompetent.

THE COURT: Objection sustained.

Q. Was the party who delivered these bonds to you the party who had organized the plaintiff company and who had contributed its entire capital stock of its organization?

MR. STOUTEMYER: We object to that. The records are the best evidence; also incompetent, irrelevant and immaterial. That is all based on hearsay.

MR. BISSELL: These are not bonds that are required to be transferred in writing. They are bearer bonds.

THE COURT: Were these bonds delivered to you by anyone as to the property of this corporation in question?

A. Yes, sir.

THE COURT: Who delivered them to you?

A. Mr. Mullen.

THE COURT: What did you do with them?

A. I delivered them to Mr. Bissell here.

THE COURT: The company held them ever since the incorporation?

A. Yes, sir.

THE COURT: As the assets of the corporation?

A. Yes.

THE COURT: You know that to be a fact without someone telling you?

A. Yes, sir.

THE COURT: Objection overruled.

MR. STOUTEMYER: May an exception be allowed?

THE COURT: Yes."

Mr. Green continued to testify:

These bonds were first delivered to me at Gooding, Idaho, in 1928.

"Q. Do you know of your own knowledge when J. K. Mullen transferred the property to the J. K. and Catherine S. Mullen Benevolent Corporation?

A. At the time of its organization.

MR. STOUTEMYER: What property? We object to that as the property is not identified. What property do you mean?

MR. BISSELL: This property here.

MR. STOUTEMYER: Those bonds?

MR. BISSELL: Yes.

THE COURT: Objection overruled, if he knows.

Q. And when were they so delivered?

MR. STOUTEMYER: We object to that on the ground that it is based upon hearsay evidence; if he knows. I will ask if he knows, not what someone told him.

THE COURT: Do you understand the question? Do you know, not what someone told you?

Q. (Cont.) To the Benevolent corporation.

A. The president of the company told me that he did. I did not see them transferred. To answer Mr. Stoutmyer's question, I did not see the bonds actually delivered to him.

THE COURT: You know only what the president of the company told you?

A. Yes, sir.

THE COURT: Objection sustained."

Mr. Green continued to testify:

The bonds in question were delivered to you in person, Mr. Bissell, by myself and Mr. J. K. Mullen at Gooding, Idaho.

"MR. BISSELL: As whose property were the bonds delivered to me for collection by yourself and J. K. Mullen in Gooding, Idaho?

MR. STOUTEMYER: We object to that on the ground that the witness has already shown his knowledge is based upon hearsay, what someone told him.

THE COURT: The question is, whose property?

MR. BISSELL: Yes.

MR. BISSELL: May I make an observation, Your Honor?

THE COURT: Yes.

MR. BISSELL: If a certain bond payable to bearer is in the possession of the duly authorized representative of a company and is delivered to an attorney for collection in that capacity that is a prima facie showing of the ownership of the bond, is it not?

THE COURT: Yes.

MR. BISSELL: That is all I was trying to prove by this witness.

MR. STOUTEMYER: In the first place, the record does not show whether this man was a duly authorized officer of the corporation; and in the second place, if the corporation owned the bonds someone else did not own them at all, as shown by this witness, and his knowledge is derived from what someone else told him.

THE COURT: This transfer, you can show that this witness as the agent of the company delivered the bonds to you for collection?

MR. STOUTEMYER: Whether the company owned them or not is objectionable on the ground that his knowledge is what someone told him.

MR. BISSELL: What I am endeavoring to show is that these bonds were delivered to me for collection as the property of that company. The bonds, you will notice, are payable to bearer, and their possession is prima facie evidence of ownership.

THE COURT: This officer apparently is not a defendant.

MR. BISSELL: I am asking what J. K. Mullen did with these bonds.

THE COURT: I think you can show they were delivered by this gentleman, delivered to you. Whether they were the property of the corporation or not is another question. I think you can show what the transaction was. Objection overruled.

(Question read.)

A. The property of the John K. Mullen and Catherine S. Mullen Benevolent Corporation."

Whereupon the plaintiffs offered plaintiff's Exhibits Nos. 1, 2 and 3 and the same were admitted over the objection of the defendant.

Whereupon counsel for the plaintiffs announced they would now take up case No. 743, being the case of the J. K. Mullen Investment Company vs. United States.

Upon direct examination witness Green testified as follows:

In my capacity as representative of the Mullen interests I had occasion to become familiar with a certain corporation known as the J. K. Mullen Investment Company.

Thereupon fourteen bonds of Local Improvement District No. 9 of the Village of American Falls were marked plaintiffs' Exhibit No. 4 for identification.

Resuming, witness Green testified:

I have seen those bonds before. They were delivered to me at Gooding, Idaho. Those bonds were delivered by me to you (Mr. Bissell) in the presence of J. K. Mullen.

"Q. And as whose property were they delivered to me for collection?

MR. STOUTEMYER: We object to that on the ground that it is not the best evidence, incompetent, and based on hearsay statements, so far as this witness is concerned, as shown by his previous testimony.

THE COURT: Objection overruled.

MR. BISSELL: I now offer plaintiff's Exhibit No. 4 for identification in evidence.

THE COURT: What is the denomination of those bonds?

MR. BISSELL: Fourteen $500.00 bonds.

MR. RAY: May I ask a question?

THE COURT: Yes.

MR. RAY: I will ask you whether these bonds were delivered to you at the same time the other bonds were delivered?

A. In 1928.

Q. All a part of the same transaction, were delivered to Mr. Bissell at the same time as the others that you described?

A. Yes.

THE COURT: Who delivered these bonds to you?

A. Mr. Mullen.

Q. (By Mr. Bissell) And you were then representing the corporation?

A. Yes, sir.

Q. You were then an officer of that corporation?

A. Yes, I was a member of that company, as its agent.

Q. When they were delivered to you, why did they deliver them to you?

A. I had handled a good many bonds and a good many papers for both that company and the Colorado Grain and Elevator Company for the J. K. Mullen Investment Company in through Southern Idaho and different notes, school bonds and other bonds; that under that condition he usually delivered them to me. I was located at American Falls and Gooding, and he always turned them over to me.

Q. Did he deliver these bonds to you and the other bonds, as testified to, to become the property of this company that you represented?

A. To become the property of this company, yes.

Q. And about when?

A. He told me—

Q. (Int.) You received them as an officer of or as a representative of the company with that understanding?

MR. STOUTEMYER: The witness started to say, 'He told me.'

Q. I asked him if he delivered these bonds to him to become the property of this company.

A. Of the Benevolent Corporation, the Investment Company, yes, were the property of the company, he told me.

Q. You received them as an officer and representative of the company under those conditions, did you?

A. I received them not as an officer of this company, no.

Q. For the Mullen Investment Company?

A. The Gooding Mullen Elevator Company. I was district manager of that at that time, which was a Mullen property, a subsidiary of the Colorado Grain and Elevator Company.

Q. How did they come into the possession of this plaintiff here?

A. Mr. Mullen organized the J. K. Mullen Investment Company as a sort of a holding company for the various interests he was interested in; the Benevolent Corporation he simply organized and transferred the bonds to as a gift to them.

Q. Do you know that to be a fact?

A. That is what he told me."

Mr. Mullen gave those bonds to me personally with my understanding at that time that they were to be the property of that company. All of

these bonds that I have testified to were to be the property of—a part to the Investment Company and a part to the Benevolent Corporation.

"Q. You say 'part of them'?

A. Bonds in Districts 1, 2 and 8 were for the Benevolent Corporation, and in District 9 were for the J. K. Mullen Investment Company.

Q. Case No. 743 is the Investment Company and No. 731 is the Benevolent Corporation?

MR. RAY: We register the same objection to this as we did to the former question, upon the ground that there is not sufficient identification of the property.

MR. STOUTEMYER: In view of the information given by counsel that the delivery was made by Mr. Mullen and not by the president of this corporation or any officer of it, and that the only knowledge that the witness has in regard to the ownership of the bonds was what Mr. Mullen or someone else told the witness, we wish to make the further objection to any further testimony and move to strike out the previous testimony on the ground it is incompetent and not the best evidence, and hearsay.

THE COURT: The bonds in these two suits involved here were delivered to you as the property of these two companies?

A. Yes, sir.

THE COURT: Did you take them and deliver them to Mr. Bissell for collection?

A. Mr. Mullen and myself together.

THE COURT: You two together?

A. Yes.

THE COURT: Objection overruled. Motion to strike denied. Anything further?

MR. STOUTEMYER: In stating that these bonds were delivered to you, part of them as the property of one corporation, and part the property of another, do you base your opinion on what somebody told you? You have no knowledge of it other than what was told to you by someone?

A. No, sir.

* * * * *

Q. The fact is to your personal knowledge that J. K. Mullen was the gentleman who organized the J. K. and Catherine S. Mullen Benevolent Corporation for the purpose of educating orphan boys and endowed it with a great many millions of dollars and that he was practically the sole owner of that corporation?

MR. STOUTEMYER: We object to that.

Q. (Cont.) And that as such he was in possession of these bonds and delivered them to you and me for collection?

MR. STOUTEMYER: I think that who organized this corporation and endowed it, if it was organized and endowed, is a matter of record.

MR. RAY: And immaterial.

THE COURT: Do you object for any other reason?

MR. STOUTEMYER: Also based on hearsay, so far as his knowledge is concerned.

THE COURT: He testified these bonds were delivered by Mr. Mullen and he knows they be-

came the property of these two companies involved in these two suits mentioned in these cases. I understand he has testified that he knew that transaction, what it was, and that they were delivered under those conditions and circumstances, other than what Mr. Mullen told him; that they were delivered to him for collection as the property of the plaintiffs. Do I misunderstand his testimony, that he testified to that?

MR. BISSELL: I think that is just about his testimony.

MR. STOUTEMYER: Also that he testified that his sole knowledge as to that is based upon hearsay, that he said Mullen delivered the bonds. His statement that they were delivered as somebody's property is based solely upon statements made to him.

THE COURT: He has also testified that he is an officer of the company, and the bonds are payable to bearer. Let us get it straightened out. I understand that in these two suits, a certain number of bonds of certain denominations, and so forth; you are familiar with those bonds, is that correct?

A. Yes, sir.

THE COURT: How did you come into possession as an officer of these plaintiffs involved in these two suits, of these bonds?

A. Mr. Mullen delivered them to me.

THE COURT: When he delivered them to you under what circumstances and conditions were they delivered to you and what knowledge

did you derive from him?

A. He delivered me the bonds in Districts 1, 2 and 8 and he said these belong to the Benevolent Corporation; and the bonds in District No. 9 were for the J. K. Mullen Investment Company. He has given me many other papers to collect for the Investment Company, and for the Colorado Grain and Elevator Company, and he wanted me to know which of these companies these bonds were for.

THE COURT: What did you do with them when they were delivered to you?

A. We went up to see Mr. Bissell and turned them over to him.

THE COURT: You were then representing what company?

A. The Gooding Grain and Elevator Company, a subsidiary of the Colorado Grain and Elevator Company, which is a Mullen organization.

THE COURT: You were then connected with the Gooding Elevator Company of Utah?

A. I was district manager of the Gooding Elevator Company.

THE COURT: How did these bonds become the property of these plaintiffs?

A. The property of these plaintiffs?

THE COURT: Yes.

A. Mr. Mullen purchased the bonds originally through the investment company.

THE COURT: The Gooding Investment Company?

A. No, the J. K. Mullen Investment Company,

and then he gave a portion of the bonds to the Benevolent Corporation. In other words, these bonds were purchased away back in 1915, I think, and the Benevolent Corporation was not organized until 1925, so that he did not give them to them until about that time, the time it was organized.

THE COURT: All right, proceed."

Upon examination by Mr. Ray, witness Green testified as follows:

I have never been an officer of the John K. and Catherine S. Mullen Benevolent Corporation or of the J. K. Mullen Investment Company.

"MR. BISSELL: As an employee of the J. K. Mullen system, of which the Oneida Elevator was a part, and the Gooding Elevator Company a part, and the Inter-Ocean Mills a part, from time to time were you delivered notes, bonds and securities for collection and instructed by the company delivering them to you to what subsidiary corporation those things belonged?

MR. STOUTEMYER: We object to that question on the ground it is incompetent, and it has not been shown that this witness was an employee of the Mullen corporations generally, but only by the Gooding Elevator Corporation.

THE COURT: Objection overruled.

A. Yes, sir.

Q. Now what corporations were in the Mullen organization and for whom did you make collections?

MR. STOUTEMYER: That is not the best evidence of what was controlled by Mr. Mullen. There is evidence of record of that fact.

THE COURT: Yes, that goes to the question of identifying the corporations.

MR. BISSELL: Here is the situation we are evidently confronted with, Mr. J. K. Mullen, as the court I think well knows, was interested in many, many corporations throughout Southern Idaho. Among those were the Victory Mills at American Falls, Gooding and Jerome, Twin Falls and Idaho Falls. All of these things were run as separate corporations under a separate name, usually called after the town or county in which they were operating. Therefore, when papers were sent out to their district manager for collection the district manager always was advised as to which particular one of these separate corporate entities this particular piece of paper belonged; that was the practice, and it goes to establish the ownership. That is the only object of this testimony, and I think it is material in order to develop the idea brought out by Your Honor in your question.

THE COURT: Answer the question.

(Question read.)

A. Yes, sir.

Q. And were suits brought on those obligations and in accordance with instructions which you received?

MR. RAY: That is immaterial, Your Honor.

THE COURT: Objection overruled.

A. Yes, sir.

MR. BISSELL: That is all.

MR. STOUTEMYER: We now move to strike all the testimony of this witness on the ground it is hearsay and not the best evidence; that the witness is incompetent to answer the question.

THE COURT: Motion denied.

MR. STOUTEMYER: (Cont.) In respect to the ownership of these bonds and his relationship to these corporations.

THE COURT: Motion to strike denied.

MR. BISSELL: One more question: Mr. Green, calling your attention to Exhibit No. 4, I will ask you to state whether the bonds therein represented are unpaid?

A. Yes, sir.

MR. BISSELL: That is all.

THE COURT: You are excused."

There was no cross-examination of witness Green.

Thereupon, Willard S. Bowen was called as a witness for plaintiff in the case of John K. and Catherine S. Mullen Benevolent Corporation v. United States (case 731) and being first duly sworn, his qualifications as an accountant being conceded, in support of the issue as to whether or not the original assessments made by the City of American Falls to meet and retire the special improvement district bond issue in Improvement Districts Nos. 1, 2, 8 and 9 of the City of American Falls was sufficient for that purpose, testified as follows:

I have made four separate audits of the books of the City of American Falls in respect to the

said improvement districts, one covering a period from 1915 to February 28, 1923; another from that time to October, 1926, which included an audit of the general fund from the time of the original audit of the improvement district funds; a third to May 3, 1927, and a fourth to May 5, 1931, which is in three sections, one of which covers the special improvement district funds and another the general funds. All of these audits are with reference to the funds of Special Improvement Districts 1, 2, 8 and 9 of the City of American Falls (plaintiff's Exhibits 8, 9, 10, 11 and 12—see appendix). Plaintiff's exhibits are carbon copies of my reports to the City of American Falls upon those audits, Exhibit 12 being a report of my general audit ending May 5, 1931.

"MR. STOUTEMYER: We have no objection to the compilation in so far as it is applicable to the issues involved in this case, but we do object to the report upon the ground that there are other matters and statements not admissible; and on the further ground that under the decision of this court the re-assessment is void; the only valid assessment was the original assessment. The only issue involved in these accounts is a question whether the original assessments were paid. And further, that in so far as purporting to apply to the payment of the original assessment, if there is any part of it applying to that, it is also improper and irrelevant and immaterial because that issue has not been raised by the pleadings, the plaintiff hav-

ing never alleged any failure to pay any part of the original assessment, which was the only valid assessment. As I understand it, the allegations of the complaint are that through mistake or inadvertence the original assessment was not sufficiently large and that that was partly responsible for the non-payment of the bonds. A re-assessment is only permissible when through mistake or inadvertence the original assessment was insufficient to pay. This data would only be material for that purpose. The original assessment — the re-assessment was attempted more than two years after the title passed to the United States, and that having been decided to be valid, all of this data and all of these records become immaterial except as to the payment on the original assessment, and that is not material because not alleged it was not paid, and no claim it was not paid.

THE COURT: That now presents the second question. I think I will reserve my ruling on that until the final argument. There might be matters in there that are mere statements of the witness here.

MR. BISSELL: That is a report of audit, and the report of an auditor is always a conclusion.

THE COURT: I will reserve my final ruling on that question as to the admissibility of this evidence.

MR. BISSELL: Subject to that it will be admitted?

THE COURT: Yes, received subject to final ruling."

Whereupon plaintiffs' Exhibit No. 8 was admitted in evidence.

"MR. BISSELL: I now offer that in evidence, the second audit report.

MR. STOUTEMYER: We object to that on the grounds as stated in the former objection.

THE COURT: The same ruling and understanding, and it will be received at this time.

* * * *

Q. Handing you a paper which has been marked plaintiffs' Exhibit No. 10 for identification, in case No. 731, I will ask you if that contains a report which you made for the City of American Falls and the audit just referred to?

A. Yes, that is a carbon copy of the original report that was handed to the officers of the City of American Falls.

MR. BISSELL: That is offered in evidence, dated June 6, 1927.

MR. STOUTEMYER: That is objected to on the grounds stated with reference to the previous offers.

THE COURT: Admitted with the same understanding and reservation of ruling.

* * * * *

MR. BISSELL: I will ask that the report of the audit of June 1st, 1931, as to special improvement funds be marked as Exhibit No. 11 in case 731, and that the report of the general audit of the same date, dated June 1st, 1931, be marked as Exhibit No. 12 in case 731.

MR. STOUTEMYER: That is objected to on the same grounds as to the last three exhibits, and on the additional ground in so far as they relate to the cause of action in this suit was filed previous to that and cannot be used to support a claim for the recovery of compensation, which must be based on the rights that the plaintiff had prior title. That is in addition to the other grounds.

THE COURT: Overruled.

MR. STOUTEMYER: I wish to move in this connection to strike out all of the Exhibits Nos. 8, 9, 10 and 11 as not applicable to the issues as presented by the pleadings and by the decision of this court an attempted re-assessment is not valid.

THE COURT: I will receive this exhibit with the same understanding as the others, that the court will reserve its ruling on the motion to strike. This goes to one of the main questions in the case."

Continuing, witness Bowen testified:

In making the audit referred to and the reports which have been entered in evidence, I had occasion to examine the original assessment made for the purpose of paying the interest and principal of bonds in Districts 1, 2 and 8 as the same became due and payable with reference to and for the purpose of ascertaining whether or not the original assessments as extended were sufficient to pay the principal and interest upon the bonds as they by their terms became due.

"MR. BISSELL: I will offer this photostatic copy of the bond assessments of the City of American Falls. I assume it is correct.

MR. STOUTEMYER: No objection to that.

THE COURT: Admitted.

(Marked plaintiff's Exhibit No. 13 in 731.)"

Continuing, witness Bowen testified:

Plaintiffs' Exhibit No. 13 in case No. 731 appears to be a photostatic copy of the bond assessments for Local Improvement Districts 1, 2, 8 and 9 and one of the books which I examined for the purpose of ascertaining whether the original assessment levies were sufficient to pay the interest on these bonds as the same became due and the principal of the bonds as the same became due according to the terms of the bond.

"Q. As a result of that examination did you determine as a mathematical problem whether or not the assessment as originally assessed is sufficient, as evidenced by that assessment roll, to pay the interest on the bonds and the principal as it became due, in accordance with the terms of the bonds, in District No. 1?

MR. STOUTEMYER: We object to that on the same grounds that were urged to the previous offers.

THE COURT: Objection overruled. Admitted."

Continuing, witness Bowen testified:

From an examination of the original assessment roll it appears that the assessments orig-

inally assessed in said special improvement districts have proven insufficient to pay the principal and interest upon the bonds of those improvement districts in full.

"Q. Did you make a similar calculation as to District No. 2?

A. I did.

Q. From your examination and calculation?

MR. STOUTEMYER: I make the same objection to this question.

THE COURT: Same ruling.

Q. Was it possible for you to determine solely as a mathematical proposition whether the original assessment made was sufficient to pay the interest and principal of the bonds as the same became due?

MR. RAY: I make the special objection to that because it does not cover the estimated cost of construction.

THE COURT: Objection overruled.

Q. Answer the question.

A. It would be possible to show that on No. 2 as well."

The estimate in the bond assessment book as to the principal of the bonds was $1.51 more than the actual bond issue in District No. 2; that is to say, $1.51 more than the principal. As to the interest, that requires another explanation, which also goes back into District No. 1 and may apply there as well. Taking into consideration the denomination of the bonds and the terms of the assessments the estimate was not sufficient to pay the principal and interest in

District No. 2. The result of my calculation as to District No. 8 was the information that the assessment estimated in one district was $14.15 more than enough to pay the principal on the bonds, but the situation as to interest is the same as in Districts Nos. 1 and 2.

"Q. At the time you were engaged in making the audit referred to in the book which you have in your hand as of October, 1926, did you have occasion — did your audit disclose that there would be a balance of bonds in District No. 1, 2 and 8 unpaid?

A. That there would be, or that there was now?

MR. STOUTEMYER: We object to that as not applicable to any issue in this case. You asked whether they are unpaid or not?

MR. BISSELL: Yes, whether any bonds are unpaid.

MR. STOUTEMYER: That is not the best evidence.

THE COURT: Objection overruled.

Q. Answer the question.

A. There are bonds unpaid in all districts."

As an auditor of the city of American Falls, I took up with some officers of the United States Government the matter of these unpaid bonds of Districts Nos. 1, 2 and 8.

"Q. To what representative of the United States Reclamation Service did you make those reports?

A. Mr. F. C. Bohlson.

Q. What position, if any, did Mr. Bohlson oc-

cupy in American Falls at this time, if you know?

MR. STOUTEMYER: We object to that as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

A. I am not able to state what position except in a general way.

Q. What was that position in a general way?

A. Well, he was apparently looking after the condemnation details, condemnation of the rights of way.

Q. And arranging for the payment of taxes to the county and apparently handling the accounts in—

MR. STOUTEMYER: (Int.) That is not within the knowledge of this witness.

Q. Do you know if Mr. F. Bohlson was an employee of the United States Reclamation Service at American Falls?

MR. STOUTEMYER: Not in responsible charge; a clerk in the office.

MR. BISSELL: I wondered if there was any real controversy about that.

MR. STOUTEMYER: We are willing to concede that he was a clerk in the office at American Falls, also a clerk in the Reclamation office in American Falls. He will go on the stand.

THE COURT: The objection is well taken.

MR. BISSELL: It is now conceded that Mr. Bohlson was a clerk in the employ of the United States Reclamation Service at American Falls, Idaho?

MR. STOUTEMYER: You have got the record as to that, Mr. Ray?

MR. RAY: That is agreed to.

Q. As auditor of the City of American Falls, did you take the matter of these unpaid bonds up with Mr. Bohlson?

A. I did.

Q. Did you at that time inform Mr. Bohlson as to the amount of bonds due?

MR. STOUTEMYER: We object to this question on the grounds previously stated, incompetent, irrelevant and immaterial.

MR. BISSELL: It is a question whether or not the government acted in good faith in the purchase of those lands if the man in charge of their office had information of the fact that these bonds were due.

MR. STOUTEMYER: The question is whether this man was in charge in such a capacity to bind the government.

THE COURT: The record is not satisfactory on that point.

Objection sustained.

Q. What, if anything, did Mr. Bohlson state as to any provision that had been made for the payment of these bonds?

MR. RAY: That is immaterial, and not binding on the government, no matter what he said.

MR. STOUTEMYER: Also hearsay. You have to show that this man had some authority to bind the government before that evidence is received.

THE COURT: If you make a connection showing this clerk's statements were binding I will allow it.

MR. BISSELL: I want to introduce it for the purpose of showing that a certain amount of money was held out, and if we can then it is competent.

THE COURT: I will allow it in subject to your making that connection. If you don't connect it up I will strike it.

Q. Answer the question."

Continuing, witness Bowen testified:

Mr. Bohlson, a clerk in the office of Construction Engineer Banks, said that there was held in some sort of a fund approximately $13,000.00 for the purpose of paying the assessment that had not been paid on the land that has been purchased. Mr. Bohlson's statement included District No. 9 in case No. 743 of the J. K. Mullen Investment Company v. United States.

Upon cross-examination, witness Bowen continued to testify as follows:

From my report of October 31, 1926 (plaintiff's Exhibit 9), it is shown that the actual collections made by the city exceeded the amount originally assessed on the assessment roll (plaintiff's Exhibit 13), in District No. 1 by approximately $1,871.44; the cause or source of that excess collection was largely, I presume, penalties and interest on delinquent taxes less the collection fee of 1½% paid to the county for han-

dling these tax collections. Many of the lot owners, prior to the time the United States purchased the property, allowed their taxes to become delinquent until the United States purchased, when they paid up not only their assessments but in addition the penalties and interest on delinquent taxes, which accounts for this excess collection. There are similar excess collections in other districts. The amount of such excess collections, as was not lost in the defunct bank, was fully applied to the payment of principal and interest upon these bonds, with the exception of a slight misapplication of $12.00. In theory the original assessments were correctly calculated to pay out the bonds and interest in ten years in annual installments, but, due to the fact that the bonds were not small enough in denomination, even had they had the funds on hand they could not have redeemed them.

"MR. RAY: Why?

A. For instance, on the original issue of No. 1, for $24,000 would pay $2400 a year; the bonds were in denominations of $1000. Each year you could have taken up $2000 worth of bonds, and the first year you would have had $400 of idle money to carry over until next year; the next year you would have had $2400 more, plus the $400, which would have been $2800. You could have taken up $2000 worth of bonds and $800 left over, which was idle money, with which to that extent to resume the interest, according to the original theory.

Q. (By Mr. Stoutemyer) As I understand you

then, the discrepancy or deficiency was due largely to the denominations in which the bonds were issued, and to the fact that the optional date of payment was not so provided as to conform to the date of collections, with the result that the money was held idle in the treasury while interest accumulated on the bonds, is that the situation?"

Witness Bowen continued to testify as follows:

I do not believe the delay in payment of the bonds after the money was collected from the lot owners was the principal cause of the default in the payment of the bonds. There was considerable loss both in principal and interest on the bonds due to the failure of the First National Bank of American Falls in which the city treasurer, after collection of local improvement district assessments, had deposited them; this loss would affect the interest item in that it would have tied up that money so that it could not have been used to redeem the bond principal or the bond coupons, the latter of which would be paid out of the first funds coming in; the principal would be deferred until there were sufficient funds to retire it, all the time drawing interest as the funds tied up in the bank drew no interest while the bonds outstanding continued to accumulate interest. There was considerable delay in the payment in addition to that which resulted from lack of conformity between the denominations of the bonds and the amount of money that came in from time to

time; however, I believe, that was not so serious. Of course the heavy tax collection period—that is the time at which the city would receive its proceeds from the heaviest tax payment—would be well around the first of the year; the interest due on these bonds was due, one on February 1 and another on February 15, as I recall, and two of them March 1, so that it was entirely possible that considerable sums of money might remain idle in the city treasury from the time it had been received from the fall tax collections up to the time it could be applied to the bonds, possibly a period of two months. One of the reasons for the trouble was largely due to the fact that the bonds were in such large denominations that they could not be conveniently paid out of the money as it came in without delay in holding money idle in the treasury. Another reason which contributed to some extent was in issuing the bonds they did not designate a convenient and economical date for the exercise of the option to pay off the bonds. If the assessment roll was made up and the assessments made prior to the time that the bonds were issued and sold as required by statute, and if the bonds had been issued in smaller denominations and with a convenient and economical option payment date, that difficulty would have been avoided. The money that had been collected from the lot owners in these assessments was deposited by the treasurer of American Falls in the bank which failed. There was on deposit by the city treasurer in the First National Bank of Ameri-

can Falls when it failed:

$1168.73 as to Improvement District No. 1
60.51 " " " " " 2
2155.95 " " " " " 8 and
3031.15 " " " " " 9.

The time elapsing between the time of closing the bank and the time of partial recoveries of deposits was as follows: The bank failed to open on February 7, 1923. The first proceeds of liquidation were paid in October, 1926. The second partial payment of proceeds of liquidation was April 4, 1927, and a still further recovery was made December 6, 1927. A part of the deposit was never paid. The loss of interest during the time these funds were tied up in the bank and until the times of partial payment is one cause for the default on the payment of the bonds as the bonds continued to draw interest at 7% but no interest was paid on these deposits until the partial payments were collected and placed on deposit with another bank at 2% interest.

A substantially greater portion of bonds in District No. 9 (case No. 743) remain outstanding and unpaid than in any of the other districts, and in that district a substantial part of the original assessment has never been paid upon lots outside the reservoir site, which is not true in those districts (Nos. 1, 2 and 8) where the United States purchased all of the lots.

"Q. In one of your reports, Mr. Bowen, you refer to a special deposit which you set up as a collection of a judgment against Sam Forter.

Who was Sam Forter?

A. Sam Forter, as I understand it, was a contractor who let—

MR. BISSELL: I object to the introduction of any evidence concerning the recovery of judgment against Sam Forter as far as Districts 1, 2 and 8 are concerned, that being a cause of action for defective construction of sidewalks, in District No. 9. That is not material here.

THE COURT: Objection sustained, but not as to No. 9.

A. Sam Forter was a contractor who constructed all, or part at least, of the sidewalks in District No. 9."

In addition to the several bond funds in the bank when it closed, there was a special deposit of a balance of an amount recovered from a contractor who constructed the improvements in all or part of Improvement District No. 9. This amount was originally $2916.53 and was paid to the City of American Falls on January 3, 1917. This $2916.53 collected from Sam Forter, the improvement contractor, was not paid upon any part of the bond issue or indebtedness.

"Q. To what extent could the default of the bonds in that district have been reduced had that collection been promptly applied to the reduction of the indebtedness of the sidewalk district instead of held in the special account and used for other purposes?

A. Well, I can best answer that by saying that at the time the First National Bank of American Falls closed, there was $438.75 in that account,

and had that been paid at that time, or before that time—

Q. (Int.) My question is, how much would it have been reduced if the amount of this collection of Forter of $2915.00 been promptly applied to reduce the bonded indebtedness. That was the question.

MR. BISSELL: That is objected to as immaterial. The bonds are in evidence and only payable at a certain time.

THE COURT: Objection sustained to the form of the question."

Continuing, witness Bowen testified on cross-examination:

The books of the city show that the general idea with reference to the payment of these special improvement district bonds was that they ran for 10 years with an option to pay them earlier than that date. Partial payments have been made upon the principal of these bonds here in evidence. A partial payment of $500 was made on bond No. 21 in Improvement District No. 1; a partial payment of $325 on bond No. 38 in District No. 8, and a partial payment of $350 on bond No. 38 in District No. 9.

On re-direct examination, witness Bowen continued to testify as follows:

On collection of the assessments in these special improvement districts, the city ultimately collected approximately $1800 in excess of the amount of the original assessment; the amount

of $1800 is arrived at in this manner: The receipts from the county treasurer, including taxes, penalties and interest, receipts direct from the Reclamation Service and receipts direct from others totaled, and deduct from that the amount set up on the tax rolls as the original estimate for principal and interest. The source of the excess payment was interest and penalties and to some extent it offset the extra interest which accrued on the bonds by reason of their not being paid promptly.

In one of my reports (plaintiff's Exhibit No. 9) I refer to a special deposit set up as a collection of a judgment against Sam Forter who, as I understand it, was a contractor who constructed all or a part of the sidewalks in District No. 9. The amount of this judgment, $2916.53, was paid to the city by Sam Forter and placed in this special fund on January 3, 1917. This fund was carried until disbursed in part as follows:

O. R. Baum, for services.....$600.00
O. F. Crowley, for services..... 150.00
American Falls Press, printing and publication.....1486.80
R. J. Newell, for labor..... 37.00,

leaving a balance in April, 1917, of $642.75. At the time the bank closed, there was a balance in the fund of $438.75. The difference between that and the $642.75 which existed in April, 1917, we were required to estimate inasmuch as it could not be directly explained, a fund of some $200.00. At the time this money was re-

ceived by the city, on April 14, 1917, there were not at that time any bonds due and payable because a year had not elapsed since the issuance of the bonds. It would have been possible at that time to have immediately applied that money to the payment of interest or principal on these bonds, but not according to the set-up or the terms of the bonds. I cannot tell just the amount of money that Districts 1, 2, and 8 lost by reason of loss of interest and of principal from the failure of the First National Bank of American Falls; the amount of money that is still unavailable by reason of the bank failure is—

for sewer district No. 1.....$131.25;
" " " No. 2..... 6.79
in sidewalk district No. 8..... 242.12

or a total of.....$380.16

computed to April, 1931. The net loss from the same cause in District No. 9 is $340.42, and in the special fund $49.28.

The difference between the principal of the bond issues of the improvement districts and the amount set up for principal on the assessment roll is as follows:

	Principal of bonds	On assessment rolls
District No. 1....	$24,000.00	$23,638.04
" " 2....	7,150.00	7,151.51
" " 8....	21,506.05	22,040.20
" " 9....	25,219.25	25,216.78

There was no additional amount set up of 1½% to pay for the collection of the principal;

that is the fee which I think the statute allows the county for collection.

On recross-examination, witness Bowen continued to testify as follows:

I did not make any calculations as to the amount of interest lost by reason of the bank failure but I know in a general way that there were a number of years when the money was tied up and no interest payment received. In making the set-up upon the assessment roll on account of the several improvement districts, there was no sum set up for payment of the first year's interest on the bonds of District No. 1; and in Districts 2, 8 and 9, this item was not originally set up but was set up in the second year in addition to the first year's interest. This fact naturally started the payment of interest and principal off upon an incorrect basis and required the city to use money received for the principal each year for the payment of interest.

"Q. And then would you say from an examination of your books and the set-up for interest and assessment that the manner of making the assessments and the mistake contained therein was responsible for the fact that the interest and principal of the bonds were not paid as the same matured, according to their terms?

A. That was very largely responsible.

Q. That is practically responsible, is it not, which really caused this condition?

Mr. BISSELL: We object to that as immate-

rial, calling for a conclusion, and hearsay.

THE COURT: Objection sustained as leading."

Continuing, witness Bowen testified as follows:

The penalty received in collection of delinquent taxes will not offset the accumulated interest on the bonds; the rate of penalty was 6% part of the time and 2% part of the time.

"Q. What do you mean by two per cent?

A. On the whole amount of taxes.

Q. There is no penalty on delinquent taxes as low as two per cent, is there?

MR. BISSELL: I object to that as calling for a conclusion and immaterial.

THE COURT: Objection sustained."

Whereupon, the plaintiff to support the issues made herein—that an attempt had been made to re-assess the property within the special improvement districts but had been prevented from so doing by action of the defendant United States in taking title to the property within said improvement districts, thereby rendering said property tax exempt—produced as a witness T. H. Davie, who being duly sworn, testified as follows:

I am the city clerk of American Falls and in custody of the ordinance book of that city. I have here original Ordinances Nos. 122 to 125 and also copies thereof. (Whereupon the copies were offered as substitutes for the originals, and marked plaintiff's Exhibit 16—see appendix.)

"MR. BISSELL: I offer them in evidence and offer to substitute in lieu thereof a copy of the American Falls Press, which was the official newspaper of the City of American Falls, which has each of the ordinances printed verbatim and in full.

MR. STOUTEMYER: We object to that on the ground it has not been shown that the United States acquired title and that the attempted reassessment was void and already discharged in this case, and therefore immaterial.

THE COURT: You do not object on the ground that they are not ordinances of the city, and passed by the city?

MR. STOUTEMYER: No.

THE COURT: Objection overruled."

Witness Davie resuming, testified as follows:

I was the owner of property in American Falls and in the reservoir site, and sold my property by contract to the United States about 1925. At the time of settlement someone in the Reclamation office, now unknown to me, explained the purpose of withholding a sum of money from the purchase price.

"Q. At the time you made settlement with the Government, did the party having charge there of the paying out of money, explain to you why a certain sum of money was being withheld from you?

A. Yes.

Q. What explanation did he give?

MR. STOUTEMYER: We object to this; it

has not been shown that any such statement was made by any one who had any authority to bind the Government.

THE COURT: Let him state who it was, if he can.

Q. Do you remember which one of those three gentlemen it was?

A. No, I do not.

THE COURT: Are you clear that it was one of those three gentlemen named?

A. I know it was a gentleman in the reclamation office.

Q. And who were in there in charge of that work, if you remember?

A. Mr. Banks, Mr. Bickel and Mr. Bohlson. I think there was also Mr. Anderson. He was in there at that time; he was a clerk of some kind.

Q. Mr. Anderson have anything to do with buying the property?

A. No.

Q. Was the gentleman with whom you settled one of the three whom you have named?

A. Yes.

THE COURT: Objection overruled. Answer the question."

Witness Davie continued to testify:

It was my understanding that it was withheld to take up the unpaid assessments upon the property.

On cross-examination, witness Davie continued to testify:

This money which was withheld was eventually paid over to me some two or three years later. I think I understood that this money was withheld temporarily.

Whereupon T. C. Sparks was introduced as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

I am an abstracter by occupation, have handled some real estimate transactions and am at present mayor of American Falls. I have also been on the city council from 1919 to 1921 and from 1923 to 1927; I was a property owner in the old town of American Falls at a time when the United States Reclamation Service was constructing the American Falls Dam. During that time F. A. Banks was the engineer in charge and he had assistants in the office during that period, a Mr. Bickel and a Mr. Bohlson, and Mr. E. P. Anderson. As an official of the city and as a property owner, I talked with Mr. Banks and the several men in his office regarding the question of payment of these improvement district bonds. When settlement was made for my property, there was an amount held up to cover contingencies arising in case there was not enough money from these sidewalk and sewer assessments to retire the bonds; this was in addition to the amount held back for the payment of current taxes, a mortgage and the payment of the balance of the ten annual assessments on my sewer and sidewalk.

"Q. Was there an amount of money held up

from you as an individual and property owner by the government for the purpose of retiring these sidewalk and sewer bonds?

MR. RAY: That calls for the conclusion of this witness.

MR. BISSELL: It calls for a fact.

THE COURT: He can state whether that was a fact or not. Overruled."

Resuming, witness Sparks testified:

There was an amount of money held up for that purpose. I had occasion to have personal knowledge as to whether or not the government was holding out similar sums of money from other sources and it was commonly known around town that a portion of the money due each property holder in the district was withheld by the government for that purpose.

"Q. How long did the government retain this money which they held out on you, telling you that it was for the purpose of paying these bonds?

MR. RAY: I don't know that they ever told him that in the testimony.

THE COURT: Yes, I think so. Did you say that?

A. Yes. For the purpose of paying the bonds.

THE COURT: Overruled."

Resuming, witness Sparks testified:

I could not say exactly in my case how long the money was held out but it seems to me it was between 18 months and 3 years. The old townsite of American Falls was not all flooded at

once; portions of American Falls in special improvement districts 1, 2 and 8, I would say, were flooded late in the fall of 1925 or winter of 1925 and spring of 1926 as the water rose during storage. I think the Grand Hotel, as I recall, was the last building to be moved in the later winter of 1925 or perhaps in the spring of 1926; my house was about the fifth house left on the townsite and I moved it off in April, 1925, and between that date and the time of the removal of the Grand Hotel was the period of removing the balance of the buildings.

On cross-examination, witness Sparks continued to testify as follows:

The lands purchased by the Government for reservoir purposes were partly secured by purchase and partly by condemnation. I believe there were two different kinds of standard form of land-purchase contract used. Defendant's Exhibit 1 is one of the forms used (Defendant's Exhibit 1 admitted in evidence without objection—See Appendix). Paragraph 7 of Defendant's Exhibit 1 provides that the government may deduct from the purchase price the amount of valid liens. Some deductions were made in purchases about the year 1923; the reassessment was not made until 1928, when there was talk about the setup not being sufficient and about a reassessment. The amount of these temporary suspensions were returned without comment to the land owners; I know they were returned and that under the terms of paragraph 7 of the

contract (Defenedant's Exhibit 1) such deductions could legally be made.

On redirect examination, witness Sparks proceeded to testify as follows:

Paragraph 7 of the contract (defendant's exhibit 1) provides that the Government may withhold the money for any liens or encumbrances existing against the property; I would not say the government withheld sufficient money to discharge these bonds in all instances but in a very great number of them. I do not know who eventually decided the question as to whether or not these bonds were liens.

Recalled, and resuming as a witness for the plaintiff, witness Sparks testified:

As an abstracter I have prepared at your request a list of the lots in Improvement District No. 9, which have been taken over by the government, together with an abstract of the reassessments reassessed against said lots under the reassessment ordinance; that is the paper marked Plaintiff's Exhibit No. 4 in case No. 743.

"MR. BISSELL: I offer this, which is certified by the abstracter, and made as such, showing the property taken over and inundated in district No. 9, together with the amount of the reassessment under the ordinance.

MR. STOUTEMYER: I do not object on the ground it is a copy, but we do object on the ground it is incompetent, irrelevant and immaterial, for a number of reasons, and including

the fact that the attempted reassessment occurred a number of years after the Government purchased the property and is void for all purposes; for the further reason there is an entire lack of showing of the necessary facts under the state statute to authorize a reassessment placed against privately owned property.

THE COURT: Objection overruled.

MR. BISSELL: Exhibit No. 4 in case 743."

Resuming, witness Sparks testified:

I am familiar with the boundaries of improvement districts 1, 2 and 8. All of district 1 and all of district 8 and most of district 2 were inundated by the building of American Falls dam and reservoir. A small portion of the high land which borders the water line of the reservoir in district No. 2 was not inundated; I have been an abstracter for 16 years in American Falls and while not engaged in the general real estate business, I have handled property for non-residents on some occasions; I have become acquainted with the value and location of various properties in American Falls and in my opinion the un-inundated portion of district No. 2 would be worthless for residence or business purposes.

No cross-examination.

O. F. Crowley, being called as a witness on behalf of the plaintiff, and being duly sworn, testified:

I reside in American Falls and have been City Treasurer since 1923 or 1924. I recall the circumstances of building the American Falls Dam

and prior to that time I was a property owner within the reservoir site. I am acquainted with Mr. Banks, the project engineer, and Mr. Bohlson, clerk, and Mr. Bickel, who were in charge of building the dam and acquiring the right of way. In dealing with them for the sale of my property there was a sum of money withheld from the purchase price when settlement was made and paid over to me about two years later. It was explained to me why the money was being withheld by whom, I don't remember, but I think it was Mr. Bickel who was one of the men in charge of the dam and with Mr. Bohlson who had to do with securing the right of way.

"Q. Did the party withholding, or with whom you were settling on behalf of the Government, then and there state why the money was withheld.

A. They did.

MR. STOUTEMYER: We object to that; there is no showing that the person he talked with had any authority to bind the Government.

THE COURT: Can't you state with whom you were dealing with there in your own transaction, what it was and what was done? Three men were there, you say?

A. Your Honor, I know what was done, but the reclamation people were frequently in my office on tax matters and different things, and it is hard for me to recall any individual transaction.

Q. With any one of those three men?

MR. STOUTEMYER: You are now testify-

ing as to your own piece of property, you say? Do you know whom you dealt with?

A. I think it was Mr. Bickel. I would not swear to that.

THE COURT: You will not make that statement; you will not swear to that?

A. I would say I think it was Mr. Bickel that the statement was made by, but it is quite a while ago.

THE COURT: Who was he?

A. One of the reclamation officials who had charge of the construction of the dam.

MR. STOUTEMYER: Was he one of the men in charge of the dam?

A. He was one of the men in charge of the dam, yes.

THE COURT: What else did he do; did he have anything to do with securing the rights of way there?

A. I think that he had to do with the securing of the right of way, if I am not mistaken, he and Mr. Bohlson.

THE COURT: Go ahead."

Resuming, witness Crowley testified as follows:

I was told that an amount sufficient to take up the delinquent payment on the sewer and sidewalk districts was withheld and in addition an amount to take up any deficiencies that might arise, such as delinquent bonds or bonds which were not paid.

On cross-examination, witness Crowley testified:

I believe my contract with the government

provided that money might be deducted from the purchase price in the amount of valid liens. I agreed to convey clear title free from liens and incumbrances for a specified amount. A reassessment was proposed in district No. 9 in 1928, but I don't know of any attempted or proposed reassessment in the other districts. When it was ultimately decided that the reassessment was not a lien, I think the money was paid to all the property owners; I suppose you would call the withholding of money a temporary suspension at the time, pending a decision.

On redirect examination, witness Crowley testified:

I think I made a contract with the government in 1924 and that the repayment was made somewhere along two or three years later.

In response to questions by the court, witness Crowley testified:

I am familiar with the area covered by these various special districts here involved in the bonds. The entire area was not covered by water under the reservoir. A large portion of No. 9 was not covered and I think a portion of sewer district No. 2 is not uniformly covered, but all that portion of the town, or the lower part of it, was not covered as I recall it, not flooded.

"THE COURT: I assume before the case is closed you will explain to the court what districts are included in this reservoir site.

MR. BISSELL: I think the pleadings allege

that districts 1, 2 and 8 are inundated and that is admitted by the answer and a portion only of district No. 9. It is plead that 1, 2 and 8 are totally inundated and it is admitted.

MR. STOUTEMYER: That is not correct. We bought all of those portions of 1, 2 and 8 but did not flood them."

On recross-examination, witness Crowley testified as follows:

As City Treasurer, I am familiar with the assessment book or assessment roll, a photostatic copy of which is in evidence (Plaintiff's Exhibit 13). The marks upon the assessment book opposite certain lots, "Assessment paid", with no assessment carried out thereafter represent the assessments paid; the levy for sidewalk being paid at the time the sidewalk was constructed. I would say that the fact that assessments were paid in full upon some of the lots, when the improvement was built accounts for the discrepancy between the total for the ten years' assessments and the total amount of the bonds.

Upon redirect examination, witness Crowley testified as follows:

All of districts 1 and 8 were inundated by the reservoir of American Falls, and I think there was a very small portion of district No. 2 that was above the water line; I could not say the acreage but just a slight point that ran down into the lake.

Whereupon plaintiffs announced that they rest, and the defendant then and there moved the court for a non-suit as and upon grounds as hereinafter set forth; and the said Judge then and there denied said motion. Thereupon the counsel for said defendant excepted to the ruling of the court as is made to appear more particularly hereinafter.

Whereupon, in order to controvert the issue that there was an implied contract between the plaintiffs and the United States and the issue as to whether plaintiffs' complaint was filed within six years of the time that the United States took title to the property in the improvement districts where the cause of action, if any, arose, Mr. F. A. Banks was called in behalf of the defendant, and being duly sworn, testified as follows:

> I am a construction engineer of the United States Bureau of Reclamation and in that capacity was in charge of the construction of the American Falls Dam and took possession of the city lots purchased by the United States. I took possession of the first piece of land in 1920 or early in the spring of 1921 and the balance of the lots required for reservoir site were acquired by the defendant the United States by purchase and condemnation between that time and the year 1926 when the dam was completed and some water stored behind the same. The lands in the improvement districts involved in this case were only partially flooded in 1926, but the reservoir was not filled until 1927.

"Q. At the time that you took possession of this property in the name of the United States for reservoir purposes, did you claim title as the title of the United States?

A. I did.

MR. BISSELL: I object to that as incompetent, irrelevant and immaterial. He may state what the facts are.

THE COURT: Objection sustained.

MR. STOUTEMYER: We offer to prove by this witness that the time this property was taken by the Government, for instance, it was taken under a claim that the United States was the owner and had title thereto. The United States did in fact have such title, and this witness never recognized the bondholders as the owner or having any interest in that property at the time it was taken for the Government of the United States.

THE COURT: Objection sustained. Go ahead.

Q. Did you take this property as the property of the United States?

A. Yes, sir.

Q. Did you do so prior to the time it was flooded?

A. Prior.

Q. Did you recognize the bondholders as the owners thereof or any interest therein?

A. No, sir.

MR. BISSELL: I object to that and move to have the answer stricken. I object to it as immaterial.

THE COURT: Objection sustained."

Resuming, witness Banks testified:

At the time of taking possession of those lots as engineer in charge of construction, I claimed title to said property as the title of the United States prior to the time it was flooded, and did not recognize the bondholders of special improvement district bonds as the owners of said lots or of any interest therein.

I have never stated that the United States withheld from the purchase price due to lot owners any money for payment of bonds, nor have any of my subordinates been authorized to make any such statement, or made any such in my presence. There was no money withheld from the purchase price due vendors or lot owners for the payment of any bonds. On some of the lot purchase transactions a sum of money was withheld from said lot vendors, temporarily, pending my receipt of a legal opinion as to whether or not a proposed reassessment against lots within said improvement districts would constitute such a valid lien which our land purchase contracts authorized us to pay and deduct from the purchase price. The money temporarily suspended was paid to the land owners.

"Q. Was that after an opinion had been rendered that the reassessment was not a valid lien?

MR. BISSELL: I object to that as immaterial for the reason there is no showing here that anybody in authority or any court ever rendered such an opinion?

THE COURT: Objection sustained."

Resuming, witness Banks testified as follows:

There was a provision in the contract that permitted the withholding of the amount of liens from the purchase price and that liens could be retired by either the record owners or the Government. There was no provision under which anything could be withheld unless there was a valid lien.

On cross-examination, witness Banks testified:

Most all of the contracts of purchase were taken in my name. I began to make those contracts for the purchase of property down there as early as 1920, and I think there was a large number of the contracts executed in 1920. As early as 1920 the government, acting through me or under my direction under the provisions of section 7 of the contract, did not hold out an amount of money sufficient to pay these special improvement district bonds. In the first contracts there was held out enough to pay the liens of record and in the later contracts there was enough held out to meet any reassessment that might be made on account of any liens. This money was retained by the government to pay any valid liens of any kind that might be established. I could not say as to whether or not there was a part of that money held out from the dates of the respective contracts of purchase. The moneys were not held out until the voucher was paid, which was some time after the contracts were executed. Any time the United States government was paying for a piece of property

purchased after the year 1925, we held out an amount of money sufficient to pay off any valid reassessment that might be made. I think that the government retained the sum of from $13,000 to $14,000 until some time in 1929 before they paid it to the land owners; it was withheld for the purpose of paying any reassessments that might be held valid liens. When the United States took the property over, it was done by purchase from the individual citizen. When we took it over we asserted it was the property of the United States by reason of purchase from the individual citizen. There was some of the property in the city of American Falls within the reservoir in improvement districts 1, 2, 8 and 9 condemned. There is a record of it. I think there was a condemnation suit against John Kosanke under the dam proper. There was quite a number, perhaps 12 or 14 pieces acquired by condemnation under the dam proper, that was to be covered by the dam. At the time I was making the purchase of only a part of the lots, I had knowledge of the fact that these improvement district bonds were outstanding and unpaid. I heard that this was true with respect to some of the lots.

F. C. Bohlson, a witness produced by and on behalf of the defendant, being first duly sworn, testified as follows:

I was employed in connection with the American Falls project in a capacity to negotiate the purchase of property for the right of way of the

American Falls dam and reservoir and to see that payments were made. My official position was that of clerk. I do not know of ever having stated that any of the money withheld was being withheld for the purpose of paying bonds.

On cross-examination, witness Bohlson testified:

I presume that I gave out checks to settle with the various owners of land for their property. In some cases there was a certain sum of money deducted from each check but not in all cases. The purpose of deducting the money from each check was to protect the United States against the possibility of other assessments in the various improvement districts. One could not tell whether the sum withheld was sufficient or not for that purpose, but we held out an amount from each property owner that was estimated to be sufficient to retire any assessments against the property that might be levied in the future, on account of the existing bonds. This was not necessarily explained to each and every lot owner. The vouchers that the lot owners signed gave the details of that quite extensively to most of them. The vouchers that the land owners signed specified the amount of money withheld and what it was for. I do not have any of these vouchers in my possession. I think the money that was held out was more for the purpose of protecting the United States against any claim that the city of American Falls might have. Personally I don't know that the bondholders had anything to do with it. That never was put into

any of the abstracts of title. I knew that there were outstanding bonds and while I did not discuss it with all of the members of the reclamation force, I know some at least knew that there were outstanding bonds. I presume I discussed it with Mr. Banks and very likely with Mr. Bickel. All of the representatives of the government that had anything to do with the acquiring of title knew that these bonds were outstanding along some time after the reports to that effect got out that the bonds were not all being retired. Prior to that we did not know that. I knew that after 1925. I could not say that the bulk of the purchases were after 1925 but we started in 1920 and got through in about 1926. Sometimes we were more active than at other times. Somewhere between $10,000 and $15,000 was held out by the government.

On redirect examination, witness Bohlson testified:

This money was withheld pending a decision as to whether there was a valid lien against these lots or not.

Whereupon, after the submission of the testimony of Chester Green, Willard S. Bowen, T. C. Sparks, T. H. Davie and O. F. Crowley, which were all of the witnesses testifying on the part of the plaintiffs, and all of whose testimony is substantially as hereinbefore set forth, and the introduction by the plaintiffs of their Exhibits Nos. 1 to 14, both inclusive, and 16, pertaining to case No. 731, and Nos. 1, 3, 4,

7, and 8 to 13, both inclusive, and 16, pertaining to case No. 743, which were all of the exhibits introduced on behalf of the plaintiffs, as hereinbefore set forth, and the introduction of defendant's Exhibit No. 1, counsel for the plaintiffs announced that the plaintiffs rest. Whereupon counsel for the defendant moved the court to grant a non-suit because of the failure of the plaintiffs to prove a cause of action against the defendant in either of said actions in the following particulars:

That the evidence wholly fails to show that the plaintiffs are or have been the owners of any property at all;

That the evidence wholly fails to show that the property claimed by the plaintiffs, if any, was acquired prior to the time that the land within the several special improvement districts was acquired by the defendant for reservoir purposes; that the testimony of plaintiffs' witnesses show that if the plaintiffs acquired any property alleged to have been injured by the action of the defendant, it was acquired long after the lands within said improvement districts were purchased by the defendant;

That the evidence wholly fails to show that the plaintiffs or their respective predecessors in interest had any lien upon the property within said improvement districts; the evidence introduced on behalf of the plaintiffs shows the original assessments levied upon property within said special improvement districts to have been paid in full and in some instances overpaid; the

evidence further shows that no reassessment has been levied against the parcels of land within said improvement districts, in accordance with the statutes authorizing such reassessment, and in no event prior to the time the defendant acquired title to and possession of the property within said special improvement districts;

That the evidence further fails to show that the failure of payment of the bonds alleged to have been owned by the plaintiffs resulted from any action of the officers or agents of the defendant; that on the contrary the evidence shows that the failure of payment of such bonds resulted from numerous causes out of control of the defendant, among which were acts of the officers of the city of American Falls over which the defendant had no control or authority. The testimony shows that the acquisition of the property within said special improvement districts by the defendant resulted in the payment of a larger sum upon said bonds than would otherwise have resulted if said property had not been so taken by the defendant.

That the evidence further fails to show that the officers of the defendant at the time of taking the property within said special improvement districts recognized the holders of bonds of such districts as the owners of the several lots and parcels of land therein, or that said officers did not take and hold said property under claim of exclusive ownership in the United States.

"THE COURT: Motion denied.

MR. RAY: Note an exception, Mr. Reporter."

Be it further remembered that thereupon the court took the decision of said cases under advisement until January 13, 1932. Whereupon the court rendered and filed his Memorandum Opinion deciding in favor of plaintiffs and against the defendant. Be it further remembered that on January 14, 1932, the court made and entered its order in each of the above entitled cases allowing the defendant sixty days from the date thereof, to-wit, sixty days from January 14, 1932, to prepare, serve and file a draft of defendant's proposed bill of exceptions. Be it further remembered that the court on January 23, 1932, made and filed its special findings of fact and conclusions of law, and the counsel for the defendant did thereupon except to the ruling of the said court in the making of said findings of fact and conclusions of law, said exceptions to be included in the bill of exceptions filed herein and is assigned as follows:

The facts are insufficient to support the judgment; the evidence is insufficient to support the findings of fact; the evidence is insufficient to support the judgment. The court received and admitted incompetent, immaterial, irrelevant and hearsay evidence in support of the findings of fact; the court refused to receive and admit competent, relevant and material evidence offered in behalf of the defendant, which should have been the basis of the court's findings of fact; there was no substantial evidence to

sustain a finding in favor of the plaintiff and against the defendant; the conclusions of law as filed by the court should be in favor of the defendant and against the plaintiff;

And be it further remembered that thereafter on the 12th day of February, 1932, the defendant filed and served its Motion to Correct the Findings of Fact to conform to the evidence; be it further remembered that on February 22, 1932, at the Boise chambers of the court, the plaintiffs and the defendant being then and there represented by their respective counsel, the court denied the motion of the defendant to correct the findings of fact to conform to the evidence and declined to correct its findings of fact and conclusions of law in the manner pointed out in said objection or at all; and counsel for the defendant did thereupon except to the ruling of the court in overruling said motion and in refusing to amend its findings of fact and conclusions of law, and the exception is allowed accordingly.

Received copy Mar. 18th, 1932.

W. G. BISSELL.

APPENDIX

The following exhibits were admitted and are referred to in the foregoing testimony:

Plaintiffs' Exhibit 1 in case No. 731; four bonds of Local Sewerage Improvement District No. 1, American Falls, Idaho, $1000 each, numbered 21, 22, 23, and 24, respectively, and dated July 15, 1915; maturity date July 15, 1925.

Plaintiffs' Exhibit 2 in case No. 731; four bonds of Local Sewerage Improvement District No. 2, American Falls, Idaho, 3 for $500 each and one for $150.00, numbered 12 to 15, inclusive, dated August 1, 1916. Maturity date, August 1, 1926.

Plaintiffs' Exhibit 3 in case No. 731; six bonds of Local Improvement District No. 8, American Falls, Idaho; $500 each, and numbered 38 to 43, inclusive, dated September 1, 1916; maturity date September 1, 1926.

Plaintiff's Exhibit 4, in case No. 743; fourteen bonds of Local Improvement District No. 9, American Falls, Idaho; $500 each, numbered 38 to 51, inclusive, and dated September 1, 1916; maturity date September 1, 1926.

Plaintiffs' Exhibit 4 in case No. 731; newspaper clipping of printed ordinances 55, 64, 65, 66, 68 and 69 of the Village of American Falls, pertaining to Local Sewerage Improvement District No. 1, American Falls, Idaho.

Plaintiffs' Exhibit 5 in case No. 731; newspaper clippings of printed ordinances Nos. 68, 74, 79 and 83 of the Village of American Falls, Idaho, pertaining to Local Sewerage Improvement District No. 2, American Falls, Idaho.

Plaintiffs' Exhibit 6 in case 731; newspaper clippings of printed ordinances Nos. 75, 80, and 84 of the Village of American Falls, Idaho, pertaining to Local Improvement District No. 8, American Falls, Idaho.

Plaintiffs' Exhibit 7 in case No. 743; newspaper clippings of printed ordinances Nos. 70,

76, 81 and 85 of the Village of American Falls, Idaho, pertaining to Local Improvement District No. 9, American Falls, Idaho.

Plaintiffs' Exhibit 8 in cases No. 731 and 743; copy of report of Auditor Willard S. Bowen, upon audit of funds of Improvement Districts 1, 2, 8 and 9 of American Falls, Idaho, covering a period from the opening of accounts to February 28, 1923.

Plaintiffs' Exhibit 9 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audits of general funds of the Village of American Falls from January 1, 1916 to October 31, 1926, and of the funds of Improvement Districts 1, 2, 8 and 9 covering a period from March 1, 1923 to October 31, 1926; report dated December 18, 1926.

Plaintiffs' Exhibit 10 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audit of general funds and funds of Improvement Districts 1, 2, 8 and 9 of American Falls, Idaho, covering period from October 31, 1926 to May 3, 1927; report dated June 6, 1927.

Plaintiffs' Exhibit 11 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audit of funds of Improvement Districts Nos. 1, 2, 8 and 9, American Falls, Idaho, from May 3, 1927 to May 5, 1931; report dated June 1, 1931.

Plaintiffs' Exhibit 12 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audit of general funds of City of American Falls, Idaho, from May 3, 1927 to May 5, 1931; report dated June 1, 1931.

Plaintiffs' Exhibit 13 in cases Nos. 731 and 743; photostatic copy of the original assessment roll of the village of American Falls, covering assessments levied and extended for a ten-year period, upon each lot or parcel of land within Improvement Districts 1, 2, 8 and 9, American Falls, Idaho.

Plaintiffs' Exhibit 14 in case No. 731 and Exhibit 3 in case No. 743; being a computation by Willard S. Bowen of the amounts due upon bonds (Plaintiffs' exhibits 1 to 4, inclusive) of Improvement Districts 1, 2, 8 and 9 of American Falls, Idaho, computed to November 1, 1931.

Plaintiffs' Exhibit 16 in cases Nos. 731 and 743; newspaper clippings of printed ordinances 122 to 125, inclusive of the city of American Falls, pertaining to reassessments in Improvement Districts Nos. 1, 2, 8 and 9, respectively, American Falls, Idaho; dated July 3, 1928.

Plaintiffs' Exhibit 1 in case No. 743; a compilation by T. C. Sparks of lots within Local Improvement District No. 9, American Falls, Idaho, acquired by the defendant for reservoir right of way purposes, with amount set after each lot of the amount of a purported reassessment under city ordinance 125 (Plaintiffs' Exhibit 16).

Defendant's Exhibit 1; being copy of land purchase contract of date of December 9, 1925, between the United States of America and C. F. Dahlen, for the purchase of Lot 7 of Block 64 of Riverside Addition to American Falls, for a consideration of $2,425.00.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

United States of America,)
) ss.
District of Idaho)

I, Charles C. Cavanah, U. S. District Judge for the District of Idaho, and the Judge before whom the within entitled action was tried, to-wit: the cause entitled The J. K. Mullen Investment Company, plaintiff, vs. The United States of America, defendant, which is case No. 743, in said District Court;

DO HEREBY CERTIFY That the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein, and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the evidence, oral and in writing therein save and except plaintiff's Exhibits 1, 4, 7, 8 to 13, inclusive, and 16, and defendant's Exhibit 1, the original of which the clerk is hereby ordered to transmit to the Appellate Court with the transcript of record and as a part thereof;

I FURTHER CERTIFY That the above and foregoing bill of exceptions was duly and regularly filed with the clerk of said court and thereafter duly and

regularly served within the time authorized by law and that no amendments were proposed thereto excepting such as are embodied therein;

I FURTHER CERTIFY That due and regular notice of time and place for settlement and certifying said bill of exceptions was given.

Dated at Boise, Idaho, this 12th day of May, 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

EXCEPTIONS TO THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed Feb. 22, 1932

Comes now here the United States of America by its counsel and excepts to the special findings of fact and conclusions of law found, made and filed by the court on the 23rd day of January, 1932, for the reasons following:

That the facts are insufficient to support the judgment; the evidence is insufficient to support the findings of fact; the evidence is insufficient to support the judgment; the court received and admitted incompetent, irrelevant, immaterial and hearsay evidence over the objections of the defendant in support of the findings of fact. The court refused to receive and admit competent, relevant and material evi-

dence offered on behalf of the defendant, which should have been the basis of the court's finding of fact. There was no substantial evidence to sustain a finding in favor of the plaintiff and against the defendant.

There is no evidence to support finding number 4 of the court and said finding is contrary to the evidence.

There is no evidence to support finding number 7 of the court and finding number 7 is contrary to the evidence.

There is no evidence to support finding number 10 of the court and said finding is contrary to the evidence.

There is no evidence to support finding number 11 of the court and the said finding is contrary to the evidence.

There is no evidence to support finding number 13 and said finding is contrary to the evidence.

There is no evidence to support finding number 14 and said finding is contrary to the evidence.

There is no evidence to support finding number 15 and said finding is contrary to the evidence.

There is no evidence to support finding number 16 and said finding is contrary to the evidence.

There is no evidence to support finding number 17 and said finding is contrary to the evidence.

There is no evidence to support finding number 18 and said finding is contrary to the evidence.

There is no evidence to support finding number 19 and said finding is contrary to the evidence.

That the defendant excepts to the first Conclusion of Law of the court for the reason that the same is not supported by the facts found by the court, or by the evidence and is contrary to the law.

Defendant excepts to the second Conclusion of Law of the court for the reason that the same is based upon insufficient findings of fact, and is not supported by the law.

Defendant excepts to the third Conclusion of Law of the court for the reason that the same is not based upon the facts found by the court, and is contrary to the law.

Defendant excepts to the fourth Conclusion of Law of the court for the reason that the same is not based upon the facts found by the court and is contrary to the law.

That the defendant excepts to the failure of the court to conclude as a matter of law in favor of the defendant and against the plaintiff.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for the Defendant.

Exceptions noted and allowed, this 22 day of February, 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

DEFENDANT'S MOTION TO CORRECT FINDINGS OF FACT TO CONFORM TO THE EVIDENCE

Filed Feb. 13, 1932

Comes now the defendant and respectfully shows to the court that the written transcript of the evidence in the above entitled cause is now available, and that such transcript shows beyond question that many of the findings of fact heretofore signed by the court are entirely without evidence to support them and are directly in conflict with the evidence, wherefore defendant moves the court to correct the findings of fact heretofore filed in the following particulars to conform to the evidence:

1. Defendant moves the court to strike out of finding No. 10 the words,

"on or about the 1st day of January, 1927"

and the words

"without any proceedings in eminent domain"

and the words

"the defendant being well aware and advised that the bonds so held by this plaintiff, and the interest thereon, were outstanding, due, and unpaid, and that the assessments levied against the property were insufficient to pay outstanding bonds so held by the plaintiff"

and the words

> "sold, destroyed, or removed all improvements located upon the lots and parcels of land within said improvement districts"

and the words

> "and thereby deprived the plaintiff of its property and totally destroyed plaintiff's said property"

and the words

> "and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and bonds aforesaid"

and the words

> "and that the property so taken by the defendant as aforesaid, was at the time of such taking and destruction of a value greatly in excess of plaintiff's said claim";

on the ground that there is no evidence whatever to support the finding that the property so taken by flooding was at the time of the taking of a value greatly in excess of the claim of the plaintiff, and no evidence of any kind whatever as to the value of the property, or any part thereof; that there is no evidence that the taking of the land and the flooding thereof or the removal of the improvements occurred on the 1st day of January, 1927, but that all the evidence is to the contrary; that there is evidence showing that part of the property was acquired by

condemnation but no evidence whatever as to who were the defendants in the condemnation suits and no evidence whatever to support the finding that the taking of the property was without any proceeding in eminent domain; that there is no evidence whatever to support the finding that the defendant sold or destroyed or removed all improvements located on the lots and parcels within said improvement districts on January 1, 1927, or at any other time, or at all, the evidence as to the removal of the improvements being the evidence of the plaintiff's witness T. C. Sparks, who testified that he was a lot owner in the area flooded by the reservoir and was the mayor of the town and that he himself removed his own improvements in April, 1925; that Mr. Sparks' testimony, which is the only testimony in the record as to who removed any of the buildings or as to the time when the removal of buildings and improvements occurred, is as follows, reduced to narrative form:

> "It would be hard to say when the United States government flooded the old townsite of American Falls; not at one time, as the lands were not all on the same level and were not all flooded at the same time. Portions of land in special improvement districts 1, 2 and 8, I would say, were flooded late in the fall of 1925 or the winter of 1925 and the spring of 1926 as the water rose during storage. One of the last buildings moved off of the old townsite, as I recall,

> was the Grand Hotel. I cannot fix the date exactly as to when it was moved, perhaps in the late winter of 1925 or perhaps in the spring of 1926. My house was about the 5th house left on the townsite, and *I moved it off in April, 1925*, and between that date and the time of the removal of the Grand Hotel was the period of removing the balance of the buildings";

that it was a common practice for the lot owners to reserve the right to their buildings and other improvements and to remove such buildings themselves and that it appears is what was done in Mr. Sparks' case and his is the sole testimony as to who moved any of the buildings and improvements; that defendant therefore moves the court to substitute, in lieu of the portions of finding 10 herein moved to be stricken out, a finding as follows:

> That during the year 1925, and prior thereto, the buildings and improvements were removed from the lots in the reservoir site, that the plaintiff's witness T. A. Sparks, one of the lot owners, testified that he moved his house in April, 1925, and that there was no testimony as to who moved any of the other houses or improvements.

2.

Defendant further moves the court to strike from finding No. 7 the words,

> "upon the issuance of said bonds, and before maturity thereof, the said J. K. Mullen acquired all of said bonds, paying therefor the full face

value thereof, and that afterwards the said J. K. Mullen transferred said bonds to the plaintiff, the J. K. Mullen Investment Company",

on the ground that there is no evidence to support the above quoted finding.

3.

Defendant further moves the court to strike out all of finding No. 11 and to strike out of finding No. 17 that part thereof reading,

"that no money collected for the payment of said bonds was lost through the delay and neglect of the city officials to apply promptly the moneys collected from the lot owners for the retirement of the bonds"

and also to strike out that part of finding No. 17 reading,

"that at the time the United States took possession of the property in said American Falls reservoir site and applied the same to a public use, the United States and the officials of the United States in charge of the property took the same as the property of private individuals and at the time of the taking, recognized the rights of the plaintiff and withheld from the private individuals owning said property an amount of money sufficient to discharge the claim of the plaintiff",

for the reason that said finding No. 11 and the said above quoted portions of finding No. 17 are not sup-

ported by the evidence but are contrary to the evidence; and the defendant moves the court to substitute, in lieu of said finding No. 11 and the said above quoted portions of finding No. 17, the following:

> That at the time the United States, acting through the officer of the United States Reclamation Bureau in charge of the construction and operation of said reservoir, F. A. Banks, took possession of the said property in the said improvement districts in the American Falls reservoir site, and flooded the same as a portion of the said American Falls reservoir, the said officer of the United States in charge of said work claimed the title to said premises was in the United States by reason of the previous purchase and condemnation thereof by the United States and the conveyance of said property to the United States prior to said flooding, and did not recognize the plaintiff herein, or the bondholders, as the owner of said premises, or of any part or interest therein; that in connection with some of the lot purchases, a portion of the purchase price was temporarily suspended pending an opinion as to whether or not there could be any valid lien on the property in the event of an attempted re-assessment after conveyance to the United States, and upon recepit of legal opinion by the legal advisers of the government that there could be no such valid lien, the amount of money temporarily suspended was paid over to the lot owners by the United States pursuant to the terms of the contracts.

This motion is made upon the records and files in this case and the evidence as submitted to the court.

The defendant further requests that in the event the foregoing motion, or any part thereof, is overruled by the court, that defendant's exception thereto be noted.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Title of Court and Cause)

MOTION FOR APPEAL
Filed Mar. 21, 1932

COMES NOW The above-named defendant, the United States of America, and enters its appeal from the final judgment of this court made and filed in the above cause on the 28th day of January, 1932, to the United States Circuit Court of Appeals, for the Ninth Circuit, returnable before said court at San Francisco, in the state of California.

The said plaintiff, the J. K. Mullen Investment Company, a corporation, and W. G. Bissell, its attorney of record, will take notice of said appeal.

H. E. RAY,
United States Attorney for the District of Idaho,
Attorney for Defendant Appellant.

(Title of Court and Cause)

PETITION FOR APPEAL

Filed Mar. 21, 1932

TO THE HONORABLE CHARLES C. CAVANAH, DISTRICT JUDGE:

Comes now the above-named defendant, United States of America, and says that on or about the 28th day of January, A. D. 1932, this court entered judgment against said defendant, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of the defendant, all of which errors will appear more in detail from the Assignments of Error, which is filed with this petition.

And petitioner further says that said cause was brought against said defendant under Title 28, Section 41, U. S. C. A.; that this appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice, and the said defendant in petition herein is acting under the direction aforesaid, and no bond for costs, supersedeas or otherwise ought, pursuant to Sections 869, 870, Title 28, United States Code, be taken or required.

WHEREFORE, The said defendant prays that an appeal be allowed in its behalf in the United States Circuit Court of Appeals for the Ninth Cir-

cuit of the United States for the correction of the errors so complained of; that said allowance operate as a supersedeas and no bond therefor or for costs or otherwise be required and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to said Circuit Court of Appeals, and that citation issue as provided by law.

H. E. RAY,
United States Attorney for the District of Idaho.

(Title of Court and Cause)

ASSIGNMENTS OF ERROR

Filed Mar. 21, 1932

The defendant assigns as errors in rulings of the court in the above entitled cause as follows:

ASSIGNMENT NO. 1

That the court erred in holding that the court had jurisdiction of this action and jurisdiction to render judgment against the United States herein:

1-a. In that there is no contract, express or implied, between the United States and the plaintiff herein and that the cause of action, if any, arises in tort.

1-b. In that the action of the United States complained of as having defeated plaintiff's

alleged sole remedy of re-assessment, namely, the action of the United States in acquiring title by purchase or condemnation to all lands in the reservoir site including those in the special improvement districts which removed the property from the taxing or assessing power of the city and state, is shown to have occurred in most cases more than six years prior to filing of this action and that plaintiff wholly failed to show what, if any, of the lots were condemned, purchased or conveyed to the United States within six years of the date of the filing of this action.

1-c. In that the loss or damage, if any, suffered by the plaintiff was of a remote, indirect, and consequential nature of a class for which congress has given the court no jurisdiction to award judgment against the United States.

1-d. In that this is an action which under the state law could not be maintained against a private lot owner, the private lot owner not being personally liable for special improvement assessments against his property, even when such assessments are valid and unpaid, the remedy being against each lot separately for its assessed portion of the cost without any authority for a personal judgment against the lot owner, and that congress has not under any condition subjected the United States to any greater liability or different form of action from that to which the private citizen or lot owner would be liable.

1-e. That the officer of the United States in charge of the construction and operation of the reservoir at the time that he took possession of

the land in the reservoir site and at the time that he flooded the land with the waters of the reservoir and applied the land to use for reservoir purposes did so under a claim of title in the United States by reason of the previous purchase and condemnation of the property and did not recognize plaintiff as the owner thereof or of any interest therein.

ASSIGNMENT OF ERROR NO. 2

That the court erred in overruling defendant's demurrer to plaintiff's amended complaint and erred in overruling each of the several grounds of demurrer set out therein.

ASSIGNMENT OF ERROR NO. 3

That the court erred in overruling defendant's motion to strike and defendant's motion to make plaintiff's amended complaint more definite and certain.

ASSIGNMENT OF ERROR NO. 4

That the court erred in his findings of fact herein, in that the said finds of fact are not supported by the evidence but are contrary to the evidence, and in including in said findings of fact numerous statements which are conclusions of law and are incorrect statements of the law.

ASSIGNMENT OF ERROR NO. 5

That the court erred in rendering judgment against the United States in an amount measured

by the unpaid balance of the bonds and interest thereon, and that such is not the proper measure of damages, and that the United States, if liable at all, could only be held liable for such part, if any, of the loss as is shown to have been caused by the United States. That many causes of loss for which the United States was in no way responsible are shown to have contributed to the default in the payment of the bonds, and that the undisputed evidence of plaintiff's own witnesses shows that the action of the United States in purchasing and condemning the real property in question not only did not cause any loss to the bondholders but, to the contrary, was distinctly beneficial to the bondholders and resulted in the payment of a larger percentage of the bonds than would otherwise have been paid, and that for that reason there was a much smaller percentage of defaulted bonds in the districts where the United States purchased or condemned all the property than in the district where the United States took only a small percentage of the property.

ASSIGNMENT OF ERROR NO. 6

That the court erred in finding, concluding and holding in his findings of fact finding No. 9 and in inserting the various allegations therein contained, in that each and every allegation contained in said finding No. 9 is purely a conclusion of law and that each and every statement therein contained is an

erroneous one, particularly the legal conclusion that the entire bond issue is a lien on each and every lot in the district notwithstanding the fact elsewhere established by the evidence found by the court (finding No. 16) that the original assessment for the payment of the bonds was paid in full by the United States, and the admission that the attempted reassessment was void and of no effect.

ASSIGNMENT OF ERROR NO. 7

That the court erred in holding that the plaintiff may recover from the United States for an alleged loss claimed to have resulted from a taking by the United States of real property on which the plaintiff as a bondholder claims a lien where the plaintiff acquired the bonds, if at all, after the United States had taken the real property in question, and the plaintiff has failed to show that it owned any bonds or property of any kind at the time of the taking which is claimed to have caused the loss or damage.

ASSIGNMENT OF ERROR NO. 8

That the court erred in rendering judgment against the United States in the amount named in the judgment herein or in any amount.

ASSIGNMENT OF ERROR NO. 9

That the court erred in that part of its finding No. 16, reading

> "That prior to the taking of the property and use as a part of the American Falls reservoir

> and prior to the flooding thereof, the defendant did not pay or cause to be paid all the liens against said improvement districts, *but only paid the amount shown upon the original assessment,*"

in that the finding that the United States paid the original assessment, which was the only assessment ever made except the admittedly void re-assessment attempted several years after the United States had acquired title to the property, renders the statement that

> "the defendant did not pay or cause to be paid all the liens against said improvement districts"

either an immaterial reference to liens held by third parties and in which the plaintiff had no interest, or an erroneous conclusion of law intended to imply that the bonds themselves are still a lien after the full payment of the assessment.

ASSIGNMENT OF ERROR NO. 10

That the court erred in finding that the plaintiff owned or acquired any bonds at any time prior to 1928, or at all, and erred in admitting over defendant's objections the incompetent hearsay testimony of the witness Chester Green (who was the only witness who testified concerning the ownership of the bonds) in view of the repeated statement of the witness that all he knew concerning the ownership of the bonds was what Mr. Mullen or someone else told him.

ASSIGNMENT OF ERROR NO. 11

That the court erred in overruling defendant's motion for a non-suit herein.

ASSIGNMENT OF ERROR NO. 12

That the court erred in each and every conclusion of law filed herein, both as to the conclusions of law which are filed as conclusions of law and the conclusions of law which are filed as findings of fact herein.

ASSIGNMENT OF ERROR NO. 13

That the court erred in the court's conclusion of law No. 1 in that even if the same were a correct statement of the law, it does not support the judgment but is in conflict with the judgment, and that the court has entered judgment contrary to and in conflict with the legal principle announced in conclusion No. 1, in that said conclusion No. 1 holds the liability of the United States to be for

> "all damages suffered by any and all persons owning or having unpaid liens upon the real estate within said district up to an amount not exceeding the reasonable value of the property taken by it"

and that no evidence whatever has been offered as to the value of the property or of any lot, block or parcel thereof. That it has been found (finding No. 16) that the United States paid in full the original assessment, which was the only valid assessment ever

levied and therefore the only lien and the only assessment ever attempted other than the admittedly void re-assessment attempted to be levied years after the United States had acquired title to the property. That, there being no unpaid lien, the judgment is in conflict with conclusion of law No. 1.

ASSIGNMENT OF ERROR NO. 14

That the court erred in that conclusion of law No. 1 is erroneous in holding that the United States contracted "impliedly", or at all, and in holding that the United States impliedly contracted "to pay *all damages suffered*", in that if the United States were liable at all, under no theory of law can it be held liable for any damage other than that shown to have been caused by it, which was no damage at all, as the evidence shows that the action of the United States was on the whole beneficial to the bondholders and resulted in the payment of a larger proportion of the bonds than would otherwise have been paid.

ASSIGNMENT OF ERROR NO. 15

That the court erred in its conclusions of law No. 2 and No. 5, in that if the United States were liable at all, said conclusions No. 2 and No. 5 do not state the proper measure of damages.

ASSIGNMENT OF ERROR NO. 16

That the court erred in holding that this action is not barred by statute of limitations.

ASSIGNMENT OF ERROR NO. 17

That the court erred in holding in effect that the facts as set out in that part of finding No. 5, reading

> "that through mistake or inadvertence the levies and assessments so made and levied were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable"

established a right to or remedy by re-assessment under the state law, Section 4141, Idaho Compiled Statutes, which authorizes or permits re-assessment only when

> "for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay *the costs of sewerage improvement.*"

That therefore no facts have been alleged, proved or found by the court sufficient to authorize re-assessment even against privately owned land. That therefore the court erred in holding that the United States, by purchasing or condemning the property, deprived the plaintiff of its sole remedy, or any remedy, which it would otherwise have had, even if under any condition the termination of the taxing power of the municipality or state by reason of the conveyance of property to the United States could give rise to a right of action against the United States for the amount of the tax or assessment which might have been levied against the property had it remained in private ownership.

ASSIGNMENT OF ERROR NO. 18

That the court erred in rendering judgment for an amount based upon and determined by the unpaid balance of the bonds and interest thereon, in that the lien of the assessments for the payment of special improvement bonds, which assessment the court has found has been paid (finding No. 16), even if it had remained unpaid would be only a secondary lien subject to a first and superior lien for state and county taxes, and that part of the property was shown to have been sold for taxes prior to purchase or condemnation by the United States and there was no evidence and is no finding as to the extent to which the secondary lien, if any, of the assessment for bond payment was extinguished by tax sale in enforcement of the superior lien of the state and county taxes.

ASSIGNMENT OF ERROR NO. 19

That the court erred in that the maximum amount for which the United States could be held liable under any condition on account of the taking of any lot or tract of land for a public purpose (even if it had not already paid the full value including all valid assessments and liens of record) would be the reasonable market value of the land, and that no evidence whatever has been offered herein as to the value of the real property taken by the United States or any part thereof, or as to whether the value thereof did or did not equal the amount of the bonds.

ASSIGNMENT OF ERROR NO. 20

That the court erred in its finding No. 10 in finding that the United States took and flooded the property in the said improvement district for reservoir purposes on January 1, 1927, in that there is no evidence to support such finding and that the same is in conflict with the evidence, and that the court erred in holding and finding that the United States on January 1, 1927, or at any other time, "sold, destroyed or removed all improvements located upon the lots and parcels of land within said sewerage and improvement districts", in that there is no evidence to support said finding and that the same is contrary to the evidence, the only evidence as to who removed the improvements being that of plaintiff's witness Sparks, who testified that he removed his own house in April, 1925, the sole testimony on this question (that of T. C. Sparks), reduced to narrative form, being as follows:

> "It would be hard to say when the United States government flooded the old townsite of American Falls; not at one time, as the lands were not all on the same level and were not all flooded at the same time. Portions of land in special improvement districts 1, 2, and 8, I would say were flooded late in the fall of 1925 or the winter of 1925 and the spring of 1926 as the water rose during storage. One of the last buildings moved off of the old townsite, as I recall, was the Grand Hotel. I cannot fix the

date exactly as to when it was moved, perhaps in the late winter of 1925 or perhaps in the spring of 1926. My house was about the 5th house left on the townsite, and *I moved it off in April, 1925*, and between that date and the time of the removal of the Grand Hotel was the period of removing the balance of the buildings."

ASSIGNMENT OF ERROR NO. 21

21-a. That the court erred in admitting and receiving in evidence the testimony of Chester Green, over the objection of the defendant, as follows:

"Q. Who were present when those bonds were delivered to me for collection?

A. J. K. Mullen.

Q. And as whose property were they delivered to me for collection?

MR. STOUTEMYER: We object to that on the ground that it is not the best evidence, incompetent, and based on hearsay statements, so far as this witness is concerned, as shown by his previous testimony.

THE COURT: Objection overruled."

21-b. That the court erred in admitting and receiving the testimony of said witness Green over the objection of the defendant, and in overruling the motion of the defendant to strike the following testimony:

"A. Mr. Mullen organized the J. K. Mullen Investment Company as a sort of a holding company for the various interests he was interested

in; the Benevolent Corporation he simply organized and transferred the bonds to it as a gift to them.

Q. Do you know that to be a fact?

A. That is what he told me.

Q. No. Where did you find these bonds that you gave to me?

A. Mr. Mullen gave them to me.

Q. Who delivered them to you?

A. Mr. Mullen gave them to me personally.

Q. With your understanding at that time that they were to be the property of that company?

A. Yes.

Q. All of these bonds that you have testified to?

A. Yes, part of them to the Investment company and part to the Benevolent corporation.

Q. You say 'part of them'?

A. Bonds in districts 1, 2 and 8 were for the Benevolent corporation, and in district 9 were for the J. K. Mullen Investment Company.

Q. Case No. 743 is the Investment company and No. 731 is the Benevolent corporation?

MR. RAY: We register the same objection to this as we did to the former question, upon the ground that there is not sufficient identification of the property.

MR. STOUTEMYER: In view of the information given by counsel that the delivery was made by Mr. Mullen and not by the president of this corporation or any officer of it, and that the only knowledge that the witness has in re-

gard to the ownership of the bonds was what Mr. Mullen or someone else told the witness, we wish to make the further objection to any further testimony and move to strike out the previous testimony on the ground it is incompetent and not the best evidence and hearsay.

THE COURT: The bonds in these two suits involved here were delivered to you as the property of these two companies?

A. Yes, sir.

THE COURT: Did you take them and deliver them to Mr. Bissell for collection?

A. Mr. Mullen and myself together.

THE COURT: You two together?

A. Yes.

THE COURT: Objection overruled. Motion to strike denied. Anything further?

MR. STOUTEMYER: In stating that these bonds were delivered to you, part of them as the property of one corporation, and part the property of another, do you base your opinion on what somebody told you? You have no knowledge of it other than what was told to you by someone?

A. No, sir."

21-c. That the court erred in admitting and receiving, over the objection of the defendant, the following testimony of witness Green:

Q. As an employee of the J. K. Mullen system, of which the Oneida Elevator was a part and the Gooding Elevator company a part, and the Interocean Mills a part, from time to time

were you delivered notes, bonds and securities for collection and instructed by the company delivering them to you to what subsidiary corporation those things belonged?

MR. STOUTEMYER: We object to that question on the ground it is incompetent, and it has not been shown that this witness was an employee of the Mullen corporations generally, but only by the Gooding Elevator Corporation.

THE COURT: Objection overruled.

A. Yes, sir."

21-d. That the court erred in overruling and denying the motion of the defendant to strike the testimony of the said witness Green as follows:

"Q. Now what corporations were in the Mullen organization and for whom did you make collections?

MR. STOUTEMYER: That is not the best evidence of what was controlled by Mr. Mullen. There is evidence of record of that fact.

THE COURT: Yes, that goes to the question of identifying the corporations.

MR. BISSELL: Here is the situation we are evidently confronted with. Mr. J. K. Mullen, as the court I think well knows, was interested in many, many corporations throughout Southern Idaho. Among those were the Victory Mills at American Falls, Gooding and Jerome, Twin Falls and Idaho Falls. All of these things were run as separate corporations under a separate name, usually called after the town or county in which they were operating. Therefore, when

papers were sent out to their district manager for collection the district manager always was advised as to which particular one of these separate corporate entities this particular piece of paper belonged; that was the practice, and it goes to establish the ownership. That is the only object of this testimony, and I think it is material in order to develop the idea brought out by Your Honor in your question.

THE COURT: Answer the question.

(Question read.)

A. Yes, sir.

Q. And were suits brought on those obligations and in accordance with instructions which you received?

MR. RAY: That is immaterial, Your Honor.

THE COURT: Objection overruled.

A. Yes, sir.

MR. BISSELL: That is all.

MR. STOUTEMYER: We now move to strike all the testimony of this witness on the ground it is hearsay and not the best evidence; that the witness is incompetent to answer the question.

THE COURT: Motion denied.

MR. STOUTEMYER: (Cont.) In respect to the ownership of these bonds and his relationship to these corporations.

THE COURT: Motion to strike denied."

ASSIGNMENT OF ERROR NO. 22

22-a. That the court erred in admitting and receiving testimony of witness Willard S. Bowen as follows:

"A. That is a carbon copy of the original report of audit covering the Local Improvement Districts Nos. 1, 2, 8 and 9, of the City of American Falls, Idaho, from the date of their organization to February 28, 1923, the original of same having been presented to the City of American Falls for their records.

MR. STOUTEMYER: We have no objection to the compilation in so far as it is applicable to the issues involved in this case, but we do object to the report upon the ground that there are other matters and statements not admissible; and on the further ground that under the decision of this court the re-assessment is void; the only valid assessment was the original assessment. The only issue involved in these accounts is a question whether the original assessments were paid. And further, that in so far as purporting to apply to the payment of the original assessment, if there is any part of it applying to that, it is also improper and irrelevant and immaterial because that issue has not been raised by the pleadings, the plaintiff having never alleged any failure to pay any part of the original assessment, which was the only valid assessment. As I understand it, the allegations of the complaint are that through mistake or inadvertence the original assessment was not sufficiently large and that that was partly responsible for the non-payment of the bonds. A re-assessment is only permissible when through mistake or inadvertence the original assessment was insufficient to pay. This data

would only be material for that purpose. The original assessment—the re-assessment was attempted more than two years after the title passed to the United States, and that having been decided to be valid, all of these data and all of these records become immaterial except as to the payment on the original assessment, and that is not material because not alleged it was not paid, and no claim it was not paid.

THE COURT: That now presents the second question. I think I will reserve my ruling on that until the final argument. There might be matters in there that are mere statements of the witness here.

MR. BISSELL: That is a report of audit, and the report of an auditor is always a conclusion.

THE COURT: I will reserve my final ruling on that question as to the admissibility of this evidence.

MR. BISSELL: Subject to that it will be admitted?

THE COURT: Yes, received subject to final ruling."

22-b. That the court erred in admitting and receiving in evidence plaintiff's Exhibit 9 over the objection of the defendant as follows:

"MR. BISSELL: I now offer that in evidence, the second audit report.

MR. STOUTEMYER: We object to that on the grounds as stated in the former objection.

THE COURT: The same ruling and understanding, and it will be received at this time."

22-c. That the court erred in admitting and receiving in evidence plaintiff's Exhibit 10 over the objection of defendant as follows:

> "Q. Handing you a paper which has been marked plaintiff's Exhibit No. 10 for identification, in case No. 731, I will ask you if that contains a report which you made for the City of American Falls and the audit just referred to?
>
> A. Yes, that is a carbon copy of the original report that was handed to the officers of the City of American Falls.
>
> MR. BISSELL: That is offered in evidence, dated June 6, 1927.
>
> MR. STOUTEMYER: That is objected to on the grounds stated with reference to the previous offers.
>
> THE COURT: Admitted with the same understanding and reservation of ruling."

22-d. That the court erred in admitting and receiving in evidence plaintiff's Exhibit 11 over the objection of the defendant, as follows:

> "MR. BISSELL: I will ask that the report of the audit of June 1st, 1931, as to special improvement funds be marked as Exhibit No. 11 in case 731, and that the report of the general audit of the same date, dated June 1st, 1931, be marked as Exhibit No. 12 in 731.
>
> MR. STOUTEMYER: That is objected to on the same grounds as to the last three exhibits, and on the additional ground in so far as they relate to the cause of action in this suit was filed

previous to that and cannot be used to support a claim for the recovery of compensation, which must be based on the rights that the plaintiff had prior title. That is in addition to the other grounds.

THE COURT: Overruled.

MR. STOUTEMYER: I wish to move in this connection to strike out all of the Exhibits Nos. 8, 9, 10 and 11 as not applicable to the issues as presented by the pleadings and by the decision of this court an attempted re-assessment is not valid.

THE COURT: I will receive this exhibit with the same understanding as the others, that the court will reserve its ruling on the motion to strike. This goes to one of the main questions in the case."

22-e. That the court erred in admitting and receiving in evidence the testimony of witness Bowen as follows:

"Q. As a result of that examination did you determine as a mathematical problem whether or not the assessment as originally assessed is sufficient, as evidenced by that assessment roll, to pay the interest on the bonds and the principal as it became due, in accordance with the terms of the bonds, in District No. 1?

MR. STOUTEMYER: We object to that on the same grounds that were urged to the previous offers.

THE COURT: Objection overruled. Admitted."

22-f. That the court erred in admitting and receiving in evidence the testimony of witness Bowen as follows:

"Q. To what representative of the United States Reclamation Service did you make these reports?

A. Mr. F. C. Bohlson.

Q. What position, if any, did Mr. Bohlson occupy in American Falls at this time, if you know?

MR. STOUTEMYER: We object to that as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

A. I am not able to state what position except in a general way.

Q. What was that position in a general way?

A. Well, he was apparently looking after the condemnation details, condemnation of the rights of way.

Q. And arranging for the payment of taxes to the county and apparently handling the accounts in—

MR. STOUTEMYER: (Int.) That is not within the knowledge of this witness.

Q. Do you know if Mr. F. Bohlson was an employee of the United States Reclamation Service at American Falls?

MR. STOUTEMYER: Not in responsible charge; a clerk in the office.

MR. BISSELL: I wondered if there was any real controversy about that.

MR. STOUTEMYER: We are willing to concede that he was a clerk in the office at Ameri-

can Falls, also a clerk in the Reclamation office in American Falls. He will go on the stand.

THE COURT: The objection is well taken.

MR. BISSELL: It is now conceded that Mr. Bohlson was a clerk in the employ of the United States Reclamation Service at American Falls, Idaho?

MR. STOUTEMYER: You have got the record as to that, Mr. Ray?

MR. RAY: That is agreed to.

Q. As auditor of the City of American Falls, did you take the matter of these unpaid bonds up with Mr. Bohlson?

A. I did.

Q. Did you at that time inform Mr. Bohlson as to the amount of bonds due?

MR. STOUTEMYER: We object to this question on the grounds previously stated, incompetent, irrelevant and immaterial.

MR. BISSELL: It is a question whether or not the government acted in good faith in the purchase of those lands if the man in charge of their office had information of the fact these bonds were due.

MR. STOUTEMYER: The question is whether this man was in charge in such a capacity to bind the government.

THE COURT: The record is not satisfactory on that point. Objection sustained.

Q. What, if anything, did Mr. Bohlson state as to any provision that had been made for the payment of these bonds?

MR. RAY: That is immaterial, and not bind-

ing on the government, no matter what he said.

MR. STOUTEMYER: Also hearsay. You have to show that this man had some authority to bind the government before that evidence is received.

THE COURT: If you make a connection showing this clerk's statements were binding I will allow it.

MR. BISSELL: I want to introduce it for the purpose of showing that a certain amount of money was held out, and if we can then it is competent.

THE COURT: I will allow it in subject to your making that connection. If you don't connect it up I will strike it.

Q. Answer the question.

A. What was the question?

(Question read.)

A. He said that there was held in some sort of a fund approximately $13,000.00."

22-g. That the court erred in admitting and receiving in evidence the plaintiff's Exhibit 14 over the objection of the defendant, as follows:

"MR. BISSELL: Very well. I offer that in evidence as plaintiff's Exhibit 14. (Exhibit 3 in case 743.)

MR. STOUTEMYER: That is objected to on the ground that the United States is not liable for the interest, and on the further ground the right of compensation in this case, if it exists at all, must have existed as of the date the suit was filed.

THE COURT: Objection overruled."

22-h. That the court erred in sustaining the objection of the plaintiff to the testimony of the witness Bowen testifying on cross-examination, as follows:

> "Q. And then would you say from an examination of your books and the setup for interest and assessment that the manner of making the assessments and the mistake contained therein was responsible for the fact that the interest and principal of the bonds were not paid as the same matured, according to their terms?
>
> A. That was very largely responsible.
>
> Q. That is practically responsible, is it not, which really caused this condition?
>
> MR. BISSELL: We object to that as immaterial, calling for a conclusion, and hearsay.
>
> THE COURT: Objection sustained as leading."

ASSIGNMENT OF ERROR NO. 23

23. That the court erred in admitting and receiving in evidence plaintiff's Exhibit 16 over objection of the defendant, as follows:

> "MR. BISSELL: I offer them in evidence and offer to substitute in lieu thereof a copy of the American Falls Post, which was the official newspaper of the City of American Falls, which has each of the ordinances printed verbatim and in full.
>
> MR. STOUTEMYER: We object to that on the ground it has not been shown that the United States acquired title and that the attempted reassessment was void and already discharged in

this case, and therefore immaterial.

THE COURT: You do not object on the ground that they are not ordinances of the city, and passed by the city?

MR. STOUTEMYER: No.

THE COURT: Objection overruled."

ASSIGNMENT OF ERROR NO. 24

24. That the court erred in admitting and receiving into evidence plaintiff's Exhibit 4 over the objection of the defendant, as follows:

"MR. BISSELL: I offer this, which is certified by the abstractor, and made as such, showing the property taken over and inundated in district No. 9, together with the amount of the re-assessment under the ordinance.

MR. STOUTEMYER: I do not object on the ground that it is a copy, but we do object on the ground it is incompetent, irrelevant and immaterial, for a number of reasons, and including the fact that the attempted re-assessment occurred a number of years after the government purchased the property and is void for all purposes; for the further reason there is an entire lack of showing of the necessary facts under the state statute to authorize a re-assessment placed against privately owned property.

THE COURT: Objection overruled.

MR. BISSELL: Exhibit No. 4 in 743."

(Note: This exhibit now shows that the number "4" has been scratched out, and the exhibit marked "Changed. Exhibit 1 in 743.")

ASSIGNMENT OF ERROR NO. 25

25-a. That the court erred in sustaining an objection of the plaintiff to the testimony of F. A. Banks, a witness testifying on behalf of the defendant, as follows:

"Q. At the time that you took possession of this property in the name of the United States for reservoir purposes, did you claim title as the title of the United States?

A. I did.

MR. BISSELL: I object to that as incompetent, irrelevant and immaterial. He may state what the facts are.

THE COURT: Objection sustained.

MR. STOUTEMYER: We offer to prove by this witness that the time this property was taken by the government, for instance, it was taken under a claim that the United States was the owner and had title thereto. The United States did in fact have such title, and this witness never recognized the bondholders as the owner or having any interest in that property at the time it was taken for the government of the United States.

THE COURT: Objection sustained. Go ahead.

Q. Did you take this property as the property of the United States?

A. Yes, sir.

Q. Did you do so prior to the time it was flooded?

A. Prior.

Q. Did you recognize the bondholders as the owners thereof or any interest therein?

A. No, sir.

MR. BISSELL: I object to that and move to have the answer stricken. I object to it as immaterial.

THE COURT: Objection sustained."

25-b. That the court erred in sustaining the objection of the plaintiff to the testimony of witness F. A. Banks, testifying as follows:

"Q. Was that after an opinion had been rendered that the re-assessment was not a valid lien?

MR. BISSELL: I object to that as immaterial for the reason there is no showing here that anybody in authority or any court ever rendered such an opinion.

THE COURT: Objection sustained."

ASSIGNMENT OF ERROR NO. 26

26. That the court erred in overruling and denying the defendant's motion to correct the court's findings of fact to conform to the evidence, and in failing to so correct its findings.

H. E. RAY,
United States Attorney for the
District of Idaho,
Attorney for Defendant Appellant.
Residence: Boise, Idaho.

B. E. STOUTEMYER,
Attorney for Defendant Appellant.
Residence: Portland, Oregon.

(Title of Court and Cause)

ORDER ALLOWING APPEAL

Filed Mar. 21, 1932

Upon the petition for appeal, accompanied by Assignments of Error, heretofore filed herein, it being made to appear that said petition should be allowed and that appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice,

IT IS ORDERED That said petition for appeal be and hereby is granted and an appeal allowed, and the same shall operate as a supersedeas and no supersedeas, cost, or other bond on appeal shall be required.

Dated this 21st day of March, A. D. 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

WRIT ON APPEAL

Filed Mar. 21, 1932

The President of the United States to the Honorable Judge of the District Court for the District of Idaho, Eastern Division, Greetings:

Because in the records and proceedings, as also in the rendition of judgment, which in the said District

Court before you between the J. K. Mullen Investment Company, a corporation, plaintiff in said court, and United States of America, defendant in said court, manifest error hath happened to the great damage of said appellant as by their complaint appears,

We being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the party aforesaid in this behalf, duly command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, within thirty days of this writ, in the said Circuit Court of Appeals to be then and there held, that the records and proceedings, aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

WITNESSETH: The Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, this 21st day of March, A. D. 1932.

W. D. McREYNOLDS,
Clerk of the United States District Court,
District of Idaho, Eastern Division.

Allowed by: CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

CITATION ON APPEAL

Filed Mar. 21, 1932

The President of the United States, to the J. K. Mullen Investment Company, a corporation, and to W. G. Bissell, its attorney, Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in the State of California, within thirty days from the date hereof pursuant to Writ on Appeal regularly issued, and which is on file in the office of the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, in an action pending in said court, wherein the United States of America is appellant, and the J. K. Mullen Investment Company, a corporation, is appellee, and to show cause, if any there be, why the judgment and proceedings in said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESSETH: The Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 21st day of March, A. D. 1932.

CHARLES C. CAVANAH,
District Judge.

Attest:
W. D. McREYNOLDS, *Clerk.*

(Title of Court and Cause)

PRAECIPE

Filed Mar. 21, 1932

To W. D. McReynolds, Clerk of the above entitled Court:

Please prepare, certify, print, return, and transmit to the Circuit Court of Appeals for the Ninth Circuit of San Francisco, California, Transcript of the Record in the above entitled cause, including therein:

1. Paragraphs 5 and 9 Original Complaint; show filing date Amended Complaint.

2. Answer of United States of America to Amended Complaint.

3. Minutes of the court showing motions made during the trial, denials of the same and exceptions thereto.

4. Findings of Fact and Conclusions of Law by the court.

5. Judgment.

6. Petitions for and orders extending time for filing Bill of Exceptions by the defendant.

7. Bill of Exceptions.

8. Exceptions allowed by the court to Findings of Fact and Conclusions of Law.

9. Motion of defendant for modification of Bill of Exceptions and Conclusions of Law. Denial of the

same and exceptions.

10. Motion for Appeal.
11. Petition for Appeal.
12. Assignment of Errors.
13. Order Granting Appeal.
14. Writ on Appeal.
15. Citation on Appeal.
16. This Praecipe.

Omit printing title of court and cause and verification.

H. E. RAY,
United States Attorney for the District of Idaho.

(Title of Court and Cause)

SUPPLEMENTAL PRAECIPE

Filed Mar. 25, 1932

To W. D. McReynolds, Clerk of the above entitled Court:

To the original Praecipe in this case, please add the following, having in mind the numbers in the original Praecipe:

3½. Demurrer of the defendant to the Amended Complaint and order overruling the same.

4½. Defendant's motion to strike portions of plaintiff's Amended Complaint, and order overruling the same.

5½. Defendant's motion to make plaintiff's Amended Complaint more definite and certain, and order overruling same.

Dated this 25th day of March, A. D. 1932.

H. E. RAY,
U. S. Attorney for the District of Idaho.

(Title of Court and Cause)

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 173, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the Transcript of the Record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipes filed herein.

I further certify that the cost of the record herein amounts to the sum of $200.60 and that the same has been paid by the appellant.

Witness my hand and the seal of said court this 10th day of June, 1932.

(Seal) W. D. McREYNOLDS,
Clerk.